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In the Supreme Court of the United States

OCTOBER TERM, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

THE MUSCOGEE (CREEK) NATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 501 *et seq.*, repealed the provision in Section 28 of the Curtis Act (Act of June 28, 1898, ch. 517 30 Stat. 504-505) that abolished the tribal courts of the Creek Nation in Oklahoma, and thereby authorizes the Creek Nation to establish tribal courts having general civil and criminal jurisdiction over cases involving tribal members.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 851 F.2d 1439. The opinion of the district court (App., *infra*, 16a-38a) is reported at 670 F. Supp. 434. The opinion of the Interior Board of Indian Appeals (App., *infra*, 39a-54a) is reported at 13 I.B.I.A. 211.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 55a-56a) was entered on July 15, 1988. On October 5, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, 83; Section 28 of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 504-505; and Sections 3 and 9 of the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967-1968, 25 U.S.C. 503 and 509, are reproduced at App., *infra*, 57a-58a.

STATEMENT

This case is one of three parallel cases that present questions concerning state and tribal jurisdiction in criminal and civil matters involving Indians in the original territory of the Five Civilized Tribes in Oklahoma. The other two cases are *State* v. *Brooks*, No. S-85-117, in which the Oklahoma Court of Criminal Appeals rendered a decision on rehearing on October 14, 1988, and *State* v. *Klindt*, No. S-84-781, which is still pending on rehearing before the Oklahoma Court of Criminal Appeals.

Respondent Muscogee (Creek) Nation is one of the Five Civilized Tribes, which occupied the former Indian Territory in the eastern portion of what is now the State of Oklahoma. It has been the consistent position of the United States and the State of Oklahoma that Oklahoma has general civil and criminal jurisdiction over matters involving Indians on restricted Indian allotments within the original territories of the Five Civilized Tribes, including the Creek Nation.[1] In the recent *Brooks* decision, the Oklahoma Court of Criminal Appeals held that the State did not have criminal jurisdiction to enforce certain

[1] The other four of the Five Civilized Tribes are the Cherokee, Chickasaw, Choctaw and Seminole Nations. The tribal lands of these Nations were divided and allotted to individual tribal members pursuant to allotment agreements at the turn of the century, and many of those allotted lands remain subject to federal restrictions on alienation.

aspects of its cigarette tax statutes against Indians operating a business on a restricted Creek allotment. The question whether the State may enforce its ordinary criminal laws on restricted allotments is presented in *Klindt*. The instant case presents the closely related question of the authority of the Muscogee Nation to exercise judicial jurisdiction in civil and criminal matters involving tribal members.

A. THE JURISDICTIONAL HISTORY OF THE INDIAN TERRITORY

1. In the 1830's, the Five Civilized Tribes were removed from their homelands in the southeastern United States to the then-unsettled region west of Arkansas, in what is now the State of Oklahoma. In the Removal Treaty of March 24, 1832 (art. XIV, 7 Stat. 366), the Creek Nation was granted its new land in fee simple, with the right of perpetual self-government. *Atlantic & Pac. R.R.* v. *Mingus*, 165 U.S. 413, 436 (1897). See also Treaty with the Creeks and Seminoles, August 7, 1856, 11 Stat. 699. After the Civil War, the Five Tribes ceded the western portion of their territory, but the Creeks' right of self-government was once again affirmed. Treaty with the Creek Indians, June 14, 1866, art. X, 14 Stat. 788. In 1867, the Creeks adopted a written constitution, which established a government consisting of legislative, executive and judicial branches. The jurisdiction of the tribal courts was limited to cases involving Creek citizens. The Creek Nation was divided into six judicial districts; the district courts tried all criminal cases and minor civil cases, and the Tribal Supreme Court tried all civil cases where the amount in controversy exceeded $100. See generally App., *infra*, 2a; *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1119-1120 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978).

Over time, law enforcement became a problem because the tribal courts did not have jurisdiction over the non-Indians who moved into the Indian Territory in increasing numbers. See *Oliphant* v. *Suquamish Indian Tribe*, 435

U.S. 191, 197-200 (1978). In response to these problems, Congress, by the Act of March 1, 1889, ch. 333, § 1, 25 Stat. 783, created a "United States court" having exclusive original jurisdiction over "all offenses against the laws of the United States committed within the Indian Territory" that were not punishable by death or imprisonment at hard labor (§ 5, 25 Stat. 783; see note 2, *infra*) and over all civil cases between citizens of the United States who resided in the Indian Territory and between a citizen of the United States and a person residing in the Indian Territory if the amount in controversy was $100 or more (§ 6, 25 Stat. 784). However, the jurisdiction of the United States court expressly excluded all "controversies between persons of Indian blood only" (*ibid.*).

In the Act of May 2, 1890, ch. 182, 26 Stat. 81, Congress established the Territory of Oklahoma in the western portion of the Indian Territory, which previously had been ceded by the Five Tribes (§§ 1-28, 26 Stat. 81-93), and expanded the jurisdiction of the United States court in the diminished Indian Territory (§§ 29-44, 26 Stat. 93-100). The civil jurisdiction of the court in the Indian Territory was extended to all civil suits except those over which the tribal courts had exclusive jurisdiction. § 29, 26 Stat. 93-94; see also § 36, 26 Stat. 97. The 1890 Act also provided that the general laws of the United States that prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States "shall have the same force and effect in the Indian Territory as elsewhere in the United States,"[2] except that the Act ex-

[2] Where offenses against the laws of the United States were punishable by death or imprisonment at hard labor, the circuit and district courts for the western district of Arkansas and the eastern district of Texas continued to exercise exclusive jurisdiction (§ 33, 26 Stat. 96-97), as they had before (Act of Mar. 1, 1889, ch. 333, §§ 17, 18, 25 Stat. 786-787; *Oliphant*, 435 U.S. at 200 & n.10). The 1890 Act

pressly did not deprive the courts of the Five Civilized Tribes of their "exclusive jurisdiction" over all cases wherein members of those Tribes were the "sole parties" and did not interfere with the right of the Tribes to punish their members for violation of tribal laws that were not contrary to the treaties and laws of the United States. § 31, 26 Stat. 96. See also § 30 (proviso), 26 Stat. 94 (retaining the "exclusive jurisdiction" of the judicial tribunals of the Indian nations in all civil and criminal cases in which tribal members were the "only parties").

2. Before long, jurisdiction over civil and criminal cases involving Indians was also vested in the United States court in the Indian Territory, subject to the same substantive laws that governed cases involving non-Indians. First, in the Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, Congress provided that on or after January 1, 1898, the United States courts in the Indian Territory shall have "original and exclusive jurisdiction" to try and determine "all civil causes in law and equity thereafter instituted" and "all criminal causes" for the punishment of offenses committed by "any person" in the Indian Territory after January 1, 1898 (30 Stat. 83). At the same time, the 1897 Act made the laws of the United States and the State of Arkansas then in force in the Indian Territory applicable to "all persons and property therein, irrespective of race" (30 Stat. 83).

Congress went still further the following year when it passed the Curtis Act (Act of June 28, 1898), ch. 517, 30 Stat. 495. Section 28 of the Curtis Act provided that on July 1, 1898, "all tribal courts in Indian Territory shall be abolished" and "all civil and criminal causes then pending in any such court shall be transferred to the United States

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also extended the criminal laws of Arkansas (with certain exceptions) to the Indian Territory for offenses not governed by federal law. § 33, 26 Stat. 96-97.

court in said Territory"—except that this provision was not to be in force as to the Chickasaw, Choctaw, and Creek Tribes until October 1, 1898. 30 Stat. 504-505.[3] The delayed effective date for those three Tribes was intended to afford them an opportunity to ratify allotment agreements with the United States that had been negotiated with the Commission to the Five Civilized Tribes (known as the Dawes Commission) and that were set forth, as amended, in the Curtis Act itself. See § 29, 30 Stat. 505-513 (Choctaw and Chickasaw Agreement); § 30, 30 Stat. 514-519 (Creek Agreement).[4] The Act provided that if the Tribes ratified the agreements, the Curtis Act would apply to those Tribes only to the extent it did not conflict with the agreements (30 Stat. 505, 514). Section 32 of the proposed agreement with the Creek Nation expressly contemplated the continuation of the Creek tribal courts (30 Stat. 518). The proposed agreement with the Choctaw and Chickasaw Tribes (known as the Atoka Agreement) apparently also contemplated the continuation of tribal courts (App., *infra*, 4a): it provided that the United States courts in the Indian Territory would have exclusive jurisdiction only over certain enumerated civil causes of action and crimes (§ 29, 30 Stat. 511), thereby indicating that the tribal courts would have concurrent jurisdiction over other matters insofar as they involved only members of the two Tribes. See also note 13, *infra*.[5]

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[3] Section 26 of the Curtis Act also provided that upon passage of the Act, "the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory" (30 Stat. 504).

[4] The Dawes Commission was established by the Act of March 3, 1893, ch. 209, 27 Stat. 612.

[5] The Seminole Nation had entered into a separate agreement, which was approved by Congress in the Act of July 1, 1898, ch. 542, 30 Stat. 567. That agreement conferred exclusive criminal jurisdiction

The Choctaw and Chickasaw Nations ratified the Atoka Agreement before the deadline prescribed by the Curtis Act, but the Creeks did not ratify their agreement. The Creeks finally entered into a different agreement, which was enacted by Congress in the Act of March 1, 1901, ch. 676, 31 Stat. 861.[6] Unlike the prior proposal, however, the 1901 agreement specifically provided that nothing in the agreement "shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress" (§ 47, 31 Stat. 873). The Cherokees also entered into an allotment agreement in 1901 that contained a provision declining to revive the tribal courts. Act of Mar. 1, 1901, ch. 675, § 72, 31 Stat. 859.

3. The allotment agreements with the Five Tribes contemplated that the tribal governments would cease to exist by March 4, 1906. However, difficulties in and Indian resistance to the enrollment and allotment process persisted to mid-1906, when Congress was considering the admission of Oklahoma to the Union. The tribal governments therefore were extended indefinitely by Joint Resolution No. 7 of March 2, 1906, 34 Stat. 822, and by Section 28 of the Five Tribes Act of April 26, 1906, ch. 1876, 34 Stat. 148. In *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1118-1131 (D.D.C. 1976), aff'd 581 F.2d 949 (D.C. Cir. 1978), the court held that the Five Tribes Act of 1906 continued the executive and legislative authority of the Creek

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on the United States court for the Indian Territory in certain civil and criminal cases, but otherwise provided that "the courts of said nation shall retain all the jurisdiction which they now have" (30 Stat. 569). The Cherokee Nation, by contrast, had refused to negotiate even a tentative agreement with the Dawes Commission (App., *infra*, 4a n.4, 44a).

[6] The agreement was ratified by the Creek National Council on May 25, 1901, and was proclaimed by the President on June 25, 1901 (App., *infra*, 24a).

government under the Creek constitution of 1867. However, neither the Five Tribes Act of 1906 nor the *Harjo* decision revived the Creek tribal court system.

4. The Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, authorized the creation of the State of Oklahoma out of the Oklahoma and Indian Territories. The Enabling Act provided for the transfer of cases arising under federal law to the newly established United States District Courts for the Eastern and Western Districts of Oklahoma, and all other cases were transferred to the state courts. §§ 16, 17, 34 Stat. 276-277. In *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936), the Oklahoma Court of Criminal Appeals held that the State has jurisdiction to prosecute an Indian for the murder of another Indian on a restricted allotment in the original territory of the Five Civilized Tribes in eastern Oklahoma.[7] After an

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[7] The State would have been without jurisdiction under the usual rules governing jurisdiction in "Indian country," which is now defined to include not only lands within an Indian reservation, but also trust or restricted allotments, whether or not within the boundaries of a reservation. See 18 U.S.C. 1151; *United States* v. *Ramsey*, 271 U.S. 467 (1926); *United States* v. *Pelican*, 232 U.S. 442, 449-450 (1914). Under the usual rules, in the absence of an Act of Congress specifically conferring jurisdiction on the State (such as the special Oklahoma statutes discussed in the text or Public Law 280, 18 U.S.C. 1162), a State has no jurisdiction over a crime committed by or against an Indian on Indian lands. If the crime is committed by an Indian against a non-Indian or by a non-Indian against an Indian, the federal government has jurisdiction under 18 U.S.C. 1152, which provides for the application of the general laws of the United States applicable to places within the sole and exclusive jurisdiction of the United States. The second paragraph of 18 U.S.C. 1152 contains an express exception for offenses committed by one Indian against the person or property of another Indian or by an Indian who has been punished by the Tribe. However, Congress separately conferred federal jurisdiction over certain "major crimes" committed by one Indian against another. 18 U.S.C. (& Supp. IV) 1153. The Tribe also has jurisdiction over

exhaustive study of the relevant statutes, including the Indian Department Appropriations Act of 1897 and the Curtis Act, the Secretary of the Interior took the same position in a letter to the Attorney General dated August 17, 1942, and that position was reaffirmed in a letter from the Secretary to the Attorney General dated March 27, 1963.[8]

5. In 1934, Congress enacted the Indian Reorganization Act (IRA),[9] which, inter alia, authorized Indian tribes to organize for their common welfare and to adopt an appropriate constitution and bylaws. § 16, 48 Stat. 987, 25 U.S.C. 476. However, that and certain other provisions of the IRA were expressly made inapplicable to Oklahoma tribes, including the Five Civilized Tribes. § 13, 48 Stat. 986, 25 U.S.C. 473. In 1936, Congress enacted a distinct statute, the Oklahoma Indian Welfare Act (OIWA),[10] that authorized any recognized tribe or band of Indians residing in Oklahoma to organize for its common welfare and to adopt a constitution and bylaws. § 3, 49 Stat. 1967, 25 U.S.C. 503.

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crimes committed by an Indian. Where the victim is also an Indian, the jurisdiction of the Tribe ordinarily is exclusive, unless the offense falls within the Major Crimes Act. On the other hand, where both the perpetrator and victim are non-Indians, the State has exclusive jurisdiction. *United States* v. *McBratney,* 104 U.S. 621 (1881).

[8] Copies of these letters were appended to the government's filing in the district court on October 15, 1986, entitled Defendant's Position on Jurisdiction Over Offenses Committed on the Lands of the Muscogee (Creek) Nation.

[9] Indian Reorganization Act (Act of June 18, 1934), ch. 576, 48 Stat. 984.

[10] Oklahoma Indian Welfare Act (Act of June 26, 1936), ch. 831, 49 Stat. 1967.

B. THE PROCEEDINGS IN THIS CASE

1. In 1979, following the decision in *Harjo* v. *Kleppe, supra,* respondent Muscogee (Creek) Nation adopted a new constitution that established a tribal government consisting of three separate branches of government, including a judiciary. Article VII, § 1 of the Creek constitution provides:

> The judicial power of The Muscogee (Creek) Nation shall be vested in one Supreme Court limited to matters of The Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain.

The constitution was approved by the Secretary of the Interior in accordance with the procedures established by Section 3 of the OIWA, 25 U.S.C. 503. The approval expressly stated that " 'nothing in this approval shall be construed as authorizing any action under the constitution that would be contrary to federal law' " (App., *infra*, 26a (quoting Admin. Rec. Exh. 3, Doc. 2)).

In 1982, the Creek Council passed Ordinance 82-30, which establishes a district court of the Muscogee Nation and provides that the Muscogee Nation shall have jurisdiction over civil and criminal cases in which, inter alia, the defendant is an enrolled member of the Nation. §§ 101, 111; Admin. Rec. Exh. 3, Doc. 4. Respondent thereafter applied for funding for the tribal courts and a tribal law-enforcement program under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.* The Bureau of Indian Affairs (BIA) denied the application. The BIA based its decision on an April 20, 1978, memorandum opinion of the Associate Solicitor for Indian Affairs that concluded that the 1897 Indian Appropriations Act and the Curtis Act had divested the Tribe of authority to establish courts with criminal and civil

jurisdiction (C.A. App. 32-44). The Interior Board of Indian Appeals affirmed (App., *infra*, 39a-54a). The Board reasoned that the Creek Nation was divested of its authority to establish tribal courts at the turn of the century and that that authority was not restored by the OIWA, because "[t]he OIWA allows Oklahoma tribes to reorganize whatever existing governmental powers they legally possess; it is not a grant of new powers" (App., *infra*, 50a).[11]

2. Respondent then brought this action in the United States District Court for the District of Columbia seeking review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, of the Secretary's decision denying the application for financial assistance. The district court granted summary judgment in favor of the Secretary (App., *infra*, 16a-38a), but the court of appeals reversed (*id.* at 1a-15a). Like the district court, the court of appeals agreed with the Secretary that the Curtis Act and the Creek Agreement Act of 1901 had unambiguously abolished the Creek tribal courts (*id.* at 6a-7a). The court of appeals also held that the tribal courts were not revived by the Five Tribes Act of 1906 (see pages 7-8, *supra*), because the 1906 Act extended only the then-"present" government of the Creek Nation

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[11] In January 1984, the Associate Solicitor for Indian Affairs revisited the question and again concluded, as he had in 1978, that the Creek Nation does not have authority to establish courts with jurisdiction to punish criminal offenses and compel the resolution of private civil disputes (C.A. App. 54-64; Admin. Rec. Exh. 3, Doc. 13). However, the Associate Solicitor noted that under *Harjo* v. *Kleppe*, *supra*, the Creek Nation retains executive and legislative power to make many decisions concerning the Nation's internal affairs, and he observed that the Nation therefore may properly assign to its courts the task of making such decisions or of reviewing the procedural or substantive correctness of decisions made by other tribal officials in such matters (App., *infra*, 36a; C.A. App. 64).

(App., *infra*, 7a). But the court of appeals held that the provision of the Curtis Act that abolished the Creek tribal courts was repealed by the OIWA and that respondent Muscogee Nation therefore may establish courts having civil and criminal jurisdiction (App., *infra*, 7a-15a).

The court of appeals first disagreed with the Secretary's conclusion that the OIWA only authorizes Oklahoma tribes to organize for the exercise of powers they have under existing law, and does not confer new powers or restore powers that were divested by Congress (App., *infra*, 7a-9a). The court acknowledged that the OIWA was patterned after and addresses the same subject as the IRA (*id.* at 9a, 13a-14a), and that the IRA expressly provides that (aside from certain specified powers conferred by the IRA itself) a tribal constitution may confer only those powers that are vested in the tribe by " 'existing law' " (*id.* at 8a (quoting 25 U.S.C. 476)). But the court held that the absence of the phrase "existing law" in the OIWA indicated that Congress intended the OIWA to have a different scope (*id.* at 9a). For this reason, the court decided that it is necessary to examine the OIWA standing alone, rather than in pari materia with the IRA, to determine if it repealed the Curtis Act's provision abolishing the tribal courts of the Creek Nation (*ibid.*).

The court of appeals recognized that "[t]he OIWA clearly does not *expressly* repeal the abolition of the Tribal Courts"; that the OIWA in fact "contains no reference to the Curtis Act or related legislation"; and that repeals by implication are not favored (App., *infra*, 9a-10a (emphasis in original)). The court further noted that a general repealer clause such as that in Section 9 of the OIWA[12] repeals only those prior laws that are in conflict (App.,

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[12] Section 9 provides that "[a]ll Acts or parts of Acts inconsistent herewith are repealed." See 25 U.S.C. 509.

infra, 10a, citing *Kremer* v. *Chemical Construction Co.*, 456 U.S. 461, 469 (1982)), and it pointed to no direct conflict between the Curtis Act and the OIWA. But the court found the general rules concerning repeals by implication and the scope of repealer clauses to be inapplicable here, in light of the principle that statutes are to be construed liberally in favor of Indians (App., *infra*, at 10a-11a, quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985)). The court explained (App., *infra*, 11a (emphasis in original)):

> If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA *must* be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it *must* be construed that way.

For the same reason, the court declined to defer to the Secretary's interpretation of the OIWA (*id.* at 11a n.8).

Pursuing this approach, the court reasoned that the term "constitution" in Section 3 of the OIWA reasonably can be construed to encompass the power to create courts with general civil and criminal jurisdiction, because the dictionary definition of that term and the regulations implementing the IRA and OIWA describe a "constitution" as the organic framework for the exercise of governmental power and because the United States Constitution, which has been used as a model for many tribal constitutions, provides for the establishment of courts (App., *infra*, 11a-12a). The court of appeals also believed that Congress intended the OIWA to eliminate differences among the laws applicable to various tribes (*id.* at 12a-13a) and that statements in the legislative history drawing a parallel between the IRA and OIWA could be read not to limit OIWA tribes to the exercise of their powers under existing

law, as under the IRA, but rather to provide that Oklahoma tribes would have the same powers as those actually exercised by IRA tribes, regardless of the source of those powers (*id.* at 13a-14a).

Finally, although "not critical to [its] decision," the court noted that under then-"current law," the State of Oklahoma "has no jurisdiction over Indians within the bounds of the Creek 'Indian country' " (App., *infra*, 14a). Because the federal government likewise is without jurisdiction over crimes committed by one Indian against another, except in the case of major crimes covered by 18 U.S.C. (& Supp. IV) 1153, the court believed that to construe the OIWA in a manner that did not repeal the Curtis Act's abolition of Creek tribal courts would result in a "jurisdictional 'no man's land' " (App., *infra*, 14a-15a).

C. THE *BROOKS* AND *KLINDT* CASES

The related question of the State's jurisdiction over restricted allotments in eastern Oklahoma has been presented in the recent *Brooks* and *Klindt* cases in the Oklahoma Court of Criminal Appeals. *Brooks* involves the application of the Oklahoma Cigarette Tax Act to a business operated by two members of the Delaware Tribe of Indians on an allotment in Tulsa County that is leased from a member of the Creek Nation. The defendants were charged with the misdemeanor offenses of failing to produce and hindering the inspection of cigarette sales records and with hindering examination of the store where the cigarettes were kept. The state trial court dismissed the information on the ground that the allotment is "Indian country" under 18 U.S.C. 1151(c) and that the State does not have jurisdiction over the offense. In *Klindt*, the defendant was charged with felony offenses—assault with a dangerous weapon and interfering with an officer—at a

"smokeshop" operated by the Delaware Tribe on a restricted Cherokee allotment in Tulsa County. The *Klindt* prosecution likewise was dismissed by the state court for lack of jurisdiction.

The State appealed the dismissals in *Brooks* and *Klindt*, and the Oklahoma Court of Criminal Appeals consolidated the two appeals. In a single opinion dated November 7, 1986, the Court of Criminal Appeals affirmed the dismissal in *Brooks*, and in the process overruled its decision in *Ex parte Nowabbi*, 60 Okla. Crim. 111, 61 P.2d 1139 (1936), which held that the State has jurisdiction over a crime committed by one Indian against another Indian on a restricted allotment within the original territory of the Five Civilized Tribes. *State* v. *Brooks*, Nos. S-85-117 and S-84-781. In the same opinion, the Court of Criminal Appeals vacated the dismissal in *Klindt* and remanded for a determination whether the defendant is an Indian, since that issue was not resolved by the record.

On December 1, 1986, the State petitioned for rehearing in both *Brooks* and *Klindt*. In March 1987, the United States filed a brief as amicus curiae in support of the State's petition for rehearing, arguing that the 1897 Appropriations Act, the Curtis Act, and the Enabling Act gave the State criminal jurisdiction over offenses committed by Indians on restricted allotments in eastern Oklahoma. On July 26, 1988, the Court of Criminal Appeals granted rehearing, withdrew its previous opinion (which had overruled *Nowabbi*), and stated that *Brooks* and *Klindt* would be dealt with in separate opinions on rehearing.

On October 14, 1988, the Court of Criminal Appeals issued its opinion on rehearing in *Brooks*. *State* v. *Brooks*, No. S-85-117. That opinion does not mention the court's prior decision in *Nowabbi* or address the question whether the State may apply its general criminal laws to Indians on

restricted allotments. Instead, the Court confined its discussion to the principles announced in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980), regarding the application of state tax laws to the on-reservation sale of cigarettes. It noted that in *Moe* and *Colville,* this Court sustained the application of the state cigarette taxes and related record-keeping requirements to on-reservation sales of cigarettes by Indians to non-Indians. For this reason, the court continued, the alleged status of the allotment as "Indian country" under 18 U.S.C. 1151(c) would not give the Indian defendants absolute immunity from state regulation, and the court therefore declined to consider whether the restricted allotment is "Indian country." Slip op. 3, 5. The court was also of the view that where a State is authorized by *Moe* and *Colville* to impose its cigarette tax on sales made to non-Indians, the State is implicitly authorized to enforce its tax laws against the Indian sellers through the state court system, as Oklahoma attempted to do in *Brooks.* Slip op. 5. However, because the informations filed against the defendants in *Brooks* did not specifically relate to sales made by them to non-Indians or to what the court termed "off-reservation" Indians, the court held that the State did not have jurisdiction. *Ibid.*

At the time this petition is being filed, the District Attorney for Tulsa County is considering whether to file a petition seeking review by this Court of the decision of the Oklahoma Court of Criminal Appeals in *Brooks,* and that court has not yet rendered its decision on rehearing in *Klindt.*

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that the Oklahoma Indian Welfare Act (OIWA) repealed the Curtis Act's abolition of the Creek Nation's courts, and that the OIWA thereby permits respondent Muscogee (Creek) Nation to establish tribal courts having general civil and criminal jurisdiction over cases involving the Nation and its members. That holding affects jurisdiction over conduct on a considerable amount of tribal land and individual allotments not only of the Creek Nation, but also of the Cherokee Nation, whose authority to establish tribal courts likewise was divested by the Curtis Act and was not revived by an allotment agreement with the United States. Moreover, the question presented here must be considered in light of *State* v. *Brooks,* No. S-85-117 (Okla. Crim. App. Oct. 14, 1988), and *State* v. *Klindt,* No. S-84-781 (Okla. Crim. App. Nov. 7, 1986), rehearing granted (July 26, 1988). *Brooks* and *Klindt* concern the jurisdiction of the State of Oklahoma over the restricted allotments of members of the Five Civilized Tribes in eastern Oklahoma. Those cases are of substantial importance to the United States, because 18 U.S.C. 1152 and 1153 and tribal law—not state law—would be applicable to offenses involving Indians on tribal land and restricted allotments in eastern Oklahoma if the State does not have such jurisdiction. In order to assure an opportunity for a conherent resolution of these interrelated jurisdictional questions, we suggest that the Court hold the petition in this case and dispose of it as appropriate in light of the disposition of *Brooks* (if the State files a petition for a writ of certiorari in that case) and in light of developments in *Klindt* as they may unfold on rehearing or thereafter in this Court.

1. The decision of the court of appeals is wrong. Congress's decision at the turn of the century to eliminate the Creek tribal courts was both deliberate and emphatic. Section 28 of the Curtis Act expressly abolished the tribal courts of all of the Five Civilized Tribes; Section 47 of the Creek Agreement Act of 1901 made clear that that Act did not revive the tribal courts of the Creek Nation[13]; and Section 28 of the Five Tribes Act of 1906 merely extended the then-"present" government of the Creek Nation, which did not include tribal courts. See pages 5-8, *supra*. Contrary to the court of appeals' conclusion, the OIWA, which was enacted 30 years later, likewise did not repeal Section 28 of the Curtis Act and thereby revive the Creek Nation's authority to establish tribal courts. The OIWA merely authorized Oklahoma tribes to organize and adopt a constitution for the exercise of the powers that they already possessed or that were expressly conferred by the OIWA itself.

a. As the court of appeals acknowledged, "[t]he OIWA clearly does not *expressly* repeal the abolition of the Tribal Courts," and indeed the OIWA "contains no reference to the Curtis Act or related legislation" (App., *infra*, 9a-10a (emphasis in original)). The court of appeals nevertheless held that Section 3 of the OIWA repealed Section 28 of the Curtis Act by implication. As the court of

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[13] The finality with which Congress acted is further underscored by the fact that although Section 24(o) of the 1901 Creek Agreement initially reserved from allotment "[o]ne acre each for the six established Creek court-houses with the improvements thereon" (31 Stat. 869), the reservation of court-house lands was repealed by Section 15 of the Supplemental Creek Agreement Act of June 30, 1902, ch. 1323, 32 Stat. 503. By contrast, Section 26(s) of the Supplemental Chickasaw and Choctaw Agreement Act of July 1, 1902, ch. 1362, 32 Stat. 645, did reserve lands for "all tribal court-houses and jails and other tribal public buildings."

appeals acknowledged, however, repeals by implication are not favored (App., *infra*, 9a-10a, citing *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and Section 3 of the OIWA does not support a finding of implied repeal in this case. Section 3 provides in relevant part (49 Stat. 1967):

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe. * * *.

This general language makes no mention of tribal courts or of judicial jurisdiction in criminal and civil cases involving tribal members. Nor does it purport to confer *new* substantive powers on a tribe or to restore inherent sovereign powers that were specifically divested by Congress in a prior law. Rather, Section 3 provides for a tribe to "organize"—which connotes only that a tribe may take procedural steps to bring order to the exercise of whatever powers the tribe already possesses by virtue of its inherent sovereignty or an Act of Congress—and to "adopt a constitution and bylaws"—which connotes only that a tribe may provide for the codification of those existing powers. Accordingly, the language of Section 3 upon which the court of appeals relied furnishes no basis for finding an implied repeal of Section 28 of the Curtis Act.

This conclusion is supported by reference to Section 16 of the IRA, 25 U.S.C. 476, after which Section 3 of the OIWA was patterned. The opening sentence of Section 16 of the IRA states, in language that is essentially identical to Section 3 of the OIWA ~~provides in relevant part~~:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, * * *.

The second paragraph of Section 16 of the IRA then provides in relevant part (emphasis added):

> In addition to all powers vested in any Indian tribe or tribal council by *existing law,* the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumberance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.

This sentence confirms that the first sentence of Section 16, quoted above, only authorizes a tribe to adopt a constitution that confers such powers as the tribe possesses under "existing law." See *United States* v. *Wheeler,* 435 U.S. 313, 327-328 (1978); 55 Interior Dec. 14 (1934). Because the first sentence of Section 3 of the OIWA (49 Stat. 1967) is written in essentially identical terms and was enacted only two years later, Section 3 should be construed in the same manner. *Lorillard* v. *Pons,* 434 U.S. 575, 580-581 (1978).

The court of appeals found it significant that Section 3 of the OIWA, unlike Section 16 of IRA, does not contain a specific reference to a tribe's powers under "existing law," and the court inferred from this omission that Congress did not intend to confine the Oklahoma tribes in the same manner (App., *infra,* 8a-9a). However, the court drew this inference by characterizing the reference to "existing law" in Section 16 of the IRA as an affirmative "limitation" on the powers that a tribe may include in a constitution adopted under the IRA (App., *infra,* 8a, 9a). The court misread Section 16. The sentence containing the

reference to "existing law" is one of authorization, not limitation. It provides for a tribal constitution to embody certain specified powers "[i]n addition to" those possessed by the tribe under existing law; the sentence takes as a given that, without express provision for the additional powers, the reach of a tribal constitution authorized by the first paragraph of Section 16 would be confined to whatever powers the tribe possesses under existing law. Because the relevant sentence of Section 3 of the OIWA was patterned after the first sentence of Section 16 of the IRA, Section 3 also takes as a given that the reach of a constitution adopted by an Oklahoma tribe is confined to the tribe's powers under existing law. The reason that Section 3 of the OIWA does not contain a sentence specifically referring to a tribe's powers under "existing law" is that Congress chose not to include in the OIWA a directive that the tribal constitution must vest certain powers "[i]n addition to" those the tribe possesses under existing law. It would be ironic to infer an affirmative *grant* of additional powers to the tribe under its constitution from Congress's *omission* of such a provision.

In any event, although the term "existing law" does not appear in Section 3 itself, that term is incorporated by reference. Section 3 permits the Secretary of the Interior to issue a "charter of incorporation" to a tribe that organizes under the OIWA; it then further provides that the charter may convey to the incorporated group, in addition to any powers that may be vested in a body incorporated under Oklahoma law, the right to participate in a revolving credit fund and "to enjoy any other rights or privileges secured to an organized Indian tribe" under certain sections of the IRA, including Section 16, 25 U.S.C. 476. As explained above, the only rights and privileges "secured" to a tribe by Section 16 of the IRA are those the tribe independently possesses under "existing law," plus the

statutorily specified powers of employing legal counsel, preventing the disposition of tribal property, and negotiating with the federal, state, or local government. The corporate charters of tribes organized under the OIWA therefore are limited in the same manner. There is no basis for believing that Congress intended to permit the *constitution* of a tribe organized under the OIWA to vest broader powers than the *charter* issued by the Secretary to the same tribe.

Finally, it is significant that the OIWA is not silent on the question of the repeal of prior laws: Section 9 of the OIWA specifically addresses that subject and provides that only those Acts or parts of Acts that are "inconsistent" with the OIWA are repealed. Section 28 of the Curtis Act is not "inconsistent" with the OIWA. Section 3 permits a tribe to organize, but subject to whatever limitations on its powers may be imposed by federal law. In the case of the Creek Nation, Section 28 is one such limitation.[14]

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[14] The absence of inconsistency is further underscored by the fact that at the time the OIWA was enacted, the reservations of the Five Civilized Tribes had largely ceased to exist and the members of the Tribes had received individual allotments, were the beneficiaries of state services, and were subject to state law by virtue of the 1897 Indian Appropriations Act, the Curtis Act, the Enabling Act, and other legislation. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 603 (1943) (the Oklahoma Indians "are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions"); *id.* at 609 ("Oklahoma supplies for them and their children schools, roads, courts, police protection and all other benefits of an ordered society."); see also S. Rep. 1232, 74th Cong., 1st Sess. 6 (1935). In these circumstances, Congress reasonably could conclude that it was unnecessary to authorize the reestablishment of tribal courts of general jurisdiction by those tribes who had been divested of that power by Section 28 of the Curtis Act. Indeed, we have been informed by the Department of the Interior that the Choctaw, Chickasaw, and

b. In rejecting the Secretary's reasonable interpretation of Section 3 of the OIWA, the court of appeals placed chief reliance on the principle that " 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit' " (App., *infra*, 11a (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. at 766)). We of course agree that this is an "eminently sound and vital" principle (*Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n. 7 (1976)); "but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes," and it is "not a license to disregard clear expressions of * * * congressional intent" (*DeCoteau* v. *District County Court*, 420 U.S. 425, 447 (1975)). See also *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). The court of appeals disregarded such expressions here.

Moreover, contrary to the court of appeals' view (App., *infra*, 11a n.8), the principle that statutes are to be construed liberally in favor of the Indians does not excuse a court from its obligation under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-845 (1984), to defer to the Secretary's reasonable administrative interpretation of the OIWA. Congress has charged the Secretary with the administration of Indian affairs, specifically including the OIWA. See 25 U.S.C. 503, 509. In administering those laws, the Secretary, like the courts, is bound by the canon that statutes are to be construed liberally in favor of the Indians. Accordingly, in this setting, a court's duty to respect the Secretary's administrative interpretation is fully consistent with the principle that statutes are to be con-

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Seminole Tribes, whose power to establish tribal courts was restored by allotment agreements after the Curtis Act was passed, do not have tribal courts at the present time.

strued liberally in favor of the Indians, because the Secretary's interpretation is guided by that canon and the Secretary's application of the canon in the implementation of a statutory program is itself a matter that is committed to his expert judgment.

2. The court of appeals, while stating that the point was not "critical" to its decision, also relied on its perception that the State of Oklahoma lacks jurisdiction over Indians in "Indian country" in eastern Oklahoma and that, as a result, if the tribal courts do not possess criminal jurisdiction over non-major crimes between Indians, no court would have jurisdiction over such offenses (App., *infra*, 14a-15a; see note 7, *supra*). Contrary to the view of the court of appeals, it is the longstanding position of the United States and the State of Oklahoma that the State does have jurisdiction over ordinary crimes committed by Indians on both restricted allotments and tribal lands within the original territory of the Five Civilized Tribes in eastern Oklahoma. See pages 8-9, *supra*. If that position is sound, an interpretation of the OIWA that preserves the Curtis Act's prohibition against the establishment of tribal courts by the Creek Nation and Cherokee Nation would not create a jurisdictional void.

In support of the proposition that the State is without jurisdiction over Indians on Indian lands within the original Creek territory, the court below cited the Oklahoma Court of Criminal Appeals' first opinion in *Brooks* and *Klindt*, dated November 7, 1986, which overruled that court's prior decision in *Nowabbi* (App., *infra*, 14a).[15] However, the

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[15] The court of appeals in the instant case also cited *Indian Country, U.S.A., Inc.* v. *Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), cert. denied, No. 87-1068 (June 27, 1988). App., *infra*, 14a. However, that case involved an attempt by the State to regulate bingo on tribal land, and the Tenth Circuit expressly declined to pass on the question of the State's jurisdiction over individual restricted allotments. 829

November 7, 1986, opinion in *Brooks* and *Klindt* has since been withdrawn, and the opinion rendered by the Court of Criminal Appeals on rehearing in *Brooks* on October 14, 1988, does not discuss *Nowabbi* or resolve the question of the State's criminal jurisdiction as a general matter. The recent decision in *Brooks* instead discusses the scope of the State's taxing and related regulatory authority over matters affecting Indians on a restricted allotment. See pages 15-16, *supra*.

At the time of the filing of this petition, the State has not yet decided whether to seek review in this Court of the Oklahoma Court of Criminal Appeals' limitation on the State's taxing and regulatory authority in *Brooks*. If the State does file a petition in *Brooks*, it is possible that a decision by this Court in the State's favor would control the issue raised by *Nowabbi* and thereby require the conclusion that the State has ordinary civil and criminal jurisdiction over matters affecting Indians on Indian lands. The result would be to undermine still further the principal basis for the court of appeals' perception in the instant case that the consequence of a holding that the OIWA did not repeal Section 28 of the Curtis Act would be to create a jurisdictional void. But whatever the State decides with respect to seeking further review in *Brooks*, as things now stand, the State *does* have full jurisdiction under *Nowabbi* over ordinary crimes committed by Indians on restricted allotments within the original territory of the Five Civilized Tribes—as distinguished from the full taxing or regulatory authority in matters affecting Indians on Indian lands involved in *Brooks*. Compare *California* v. *Cabazon Band*

F.2d at 980 n.5. Moreover the question of state regulatory and taxing jurisdiction over tribal matters is distinct from questions of general criminal and civil judicial jurisdiction over Indian lands. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 207-210 (1987); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

of Mission Indians, 480 U.S. 202, 207-210 (1987). The conclusion by the court of appeals in the instant case that the State lacks general civil and criminal jurisdiction over Indians on Indian lands in eastern Oklahoma therefore is inconsistent with the presently controlling state-court precedent.[16]

We do not, however, suggest that the Court grant plenary review in the instant case at the present time based on the court of appeals' assumption regarding the scope of state jurisdiction, since that question is not directly involved in this case. Moreover, the continuing validity of *Nowabbi* may be addressed by the Oklahoma Court of Criminal Appeals in *Klindt,* the companion to *Brooks* that is still pending on rehearing before the Oklahoma Court of Criminal Appeals. See pages 14-16, *supra.* If the Court of Criminal Appeals reaffirms the existence of general state civil and criminal adjudicatory jurisdiction over members of the Five Civilized Tribes in *Klindt,* and if that ruling is not overturned by this Court, we would suggest that the Court grant the petition in the instant case, vacate the judgment below, and remand for further consideration of the proper construction of the OIWA in light of the holding and analysis in *Klindt.* That course would be appropriate both because such a holding in *Klindt* would eliminate any basis for the court of appeals' assumption that a jurisdictional void would result from a contrary interpretation of the OIWA, and because the existence of state jurisdiction would furnish a sound basis on which the Secretary could deny or limit financial assistance to respondent for the maintenance of tribal courts and a tribal law-enforcement program whose jurisdiction would be concurrent with that of the State. On the other hand, if

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[16] The Oklahoma Supreme Court questioned the rationale of *Nowabbi* in *State ex rel. May* v. *Seneca-Cayuga Tribe,* 711 P.2d 77, 81 n.17 (Okla. 1985), but it did not purport to overrule *Nowabbi.*

it is ultimately determined in *Brooks* or *Klindt* that the State does not have general civil and criminal adjudicatory jurisdiction over matters involving Indians on Indian lands in eastern Oklahoma, the court of appeals' assumption of a jurisdictional void would be substantiated and we would give further consideration to whether we should continue to seek this Court's review in this case.

As is evident, the jurisdictional issues implicated by this case, *Brooks,* and *Klindt* are complex and interrelated. Those issues also have important consequences for the United States, because if the state courts do not have jurisdiction over ordinary crimes involving Indians on Indian lands, the federal government would have to assume responsibility for criminal law enforcement under 18 U.S.C. (& Supp. IV) 1152 and 1153 and may be impelled to fund tribal law enforcement programs, or to institute BIA law-enforcement and "CFR courts" (see *United States* v. *Wheeler,* 435 U.S. at 327 & n.26), in order to supplement 18 U.S.C. (& Supp. IV) 1152 and 1153 with respect to minor offenses by Indians that are not covered by the Major Crimes Act. The potential consequences are substantial as a practical matter, because we have been informed by the Department of the Interior that as of 1985, there were approximately 413,000 acres of trust or restricted individual Indian lands (comprising an estimated 20,000 separate tracts) and more than 60,000 acres of tribal lands within the original territory of the Five Civilized Tribes in eastern Oklahoma.[17] Our principal interest in the present case is to preserve the opportunity for a comprehensive and coherent resolution of the various jurisdictional issues

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[17] As of 1985, there were approximately 143,000 acres of individual and tribal trust or restricted Creek lands and more than 90,000 acres of such Cherokee lands that would be potentially affected by the decision of the court of appeals that the OIWA repeals Section 28 of the Curtis Act and permits the Creek (and Cherokee) Nation to establish tribal courts.

raised by the parallel state and federal cases, and we have filed the petition in this case for that purpose pending further developments in *Brooks* and *Klindt*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of a petition for a writ of certiorari seeking review of the decision in *State* v. *Brooks*, No. S-85-117 (Okla. Crim. App. Oct. 14, 1988), if the State files a petition in that case, and in light of further developments on rehearing in *State* v. *Klindt*, No. S-84-781 (Okla. Crim. App. Nov. 7, 1986), rehearing granted (July 26, 1988).

Respectfully submitted.

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NOVEMBER 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5377

MUSCOGEE (CREEK) NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, APPELLANT

v.

DONALD HODEL, SECRETARY, U.S. DEPARTMENT OF INTERIOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(Civil Action No. 85-02668)

Argued June 1, 1988
Decided July 15, 1988

Before ROBINSON, RUTH B. GINSBURG and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: In 1982, the Muscogee (Creek) Nation (hereinafter "Creeks" or "Tribe") passed an ordinance authorizing the Creek Tribal Court to enforce civil and criminal jurisdiction over Tribal members and subsequently sought funding from the Bureau of In-

dian Affairs (BIA) for the Tribal Court and law enforcement program. The BIA, and thereafter the Department of the Interior (Interior), denied the request for funds, maintaining that the Tribe had no power to establish Tribal Courts with civil and criminal jurisdiction. The District Court agreed. *Muscogee (Creek) Nation v. Hodel,* 670 F. Supp. 434 (D.D.C. 1987). We reverse.

BACKGROUND

In the 1830s, the Muscogee (Creek) Nation was forcibly removed from the Southeastern United States to land in what is now Oklahoma. The Creek Nation was granted the new land in fee simple with the right to perpetual self-government. Treaty of March 24, 1832, 7 Stat. 366. Following the Civil War, the United States forced the Creeks to cede the western portion of their territory as a penalty for the Tribe's alliance with the Confederacy, but the Tribe's title to the remaining portion of the territory and its right to self-government were reaffirmed. Treaty of June 4, 1866, 14 Stat. 785.

In 1867, the Creeks established a written constitutional form of government which included a separation of powers into executive, legislative and judicial branches. Tribal district courts tried all criminal cases and minor civil cases involving Creek citizens, and a Tribal Supreme Court tried all civil cases involving an amount in controversy in excess of one hundred dollars. *Harjo v. Kleppe,* 420 F. Supp. 1110, 1120 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978).

In 1887, Congress passed the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.* (1983)), which provided that lands held in trust for the Indians by the United States would be divided up and parcels given to individual In-

dians in fee simple. White settlers could obtain surplus parcels. Allotment was justified as a means of accomplishing the then current policy of assimilation. Felix S. Cohen, Handbook of Federal Indian Law 128 (1982 ed.). The Creek's land, as well as that of the Choctaw, Cherokee,[1] Chickasaw and Seminole tribes[2] was excluded from the General Allotment Act because of Treaty provisions, and, more importantly, because those tribes held their land in fee simple. Therefore, those tribes had to *agree* to allotment. *See Woodward v. De Graffenried,* 238 U.S. 284, 294 (1915).

In 1893, Congress created the Dawes Commission and empowered it to negotiate allotment agreements with the Five Civilized Tribes, including the Creeks. Act of March 3, 1893, ch. 209, 27 Stat. 612, 645. However, over the next several years the Commission was unable to negotiate agreements with any of the Five Tribes. As a result, in 1897, Congress added several provisions to the Indian Department Appropriations Act designed to coerce the tribes to negotiate with the Commission. Act of June 7, 1897, ch. 3, 30 Stat. 62. The 1897 Act required that, after January 1, 1898, all laws passed by the councils of the Five Tribes would be subject to Presidential veto except resolutions for adjournment or acts relating to negotiations with the Dawes Commission. It also extended jurisdiction of the federal courts in Indian Territory to Five Tribes members, but provided that any agreement between the Dawes Commission and one of the tribes would suspend conflicting provisions of the Act as to the agreeing tribe.

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[1] All references to the "Cherokee" tribe are to the Western or Oklahoma Cherokees.

[2] These tribes are known collectively as the Five Civilized Tribes because of their adaptability in developing institutions comparable in many respects to the European models. V. Deloria, Jr. and C. Lytle, American Indians, American Justice 86-87 (1983).

The Creeks (as well as other tribes) nevertheless resisted. When it became apparent that the Creeks, Choctaws, Chickasaws and Cherokees[3] would not cooperate, Congress passed the Curtis Act. Act of June 28, 1898, ch. 517, 30 Stat. 495. That Act provided for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment. It also made tribal laws unenforceable in the United States Court in Indian Territory. More importantly for our purposes, the Act purported to abolish all tribal courts in Indian Territory, effective July 1, 1898 for most tribes, but effective October 1, 1898 for the Chickasaw, Choctaw and Creek Tribes.[4] The Curtis Act also incorporated tentative agreements reached earlier with the Creek, Choctaw and Chickasaw Tribes and provided that those agreements would supersede any inconsistent provisions of the Curtis Act if ratified by the tribes by October 1, 1898. Each tentative agreement preserved tribal courts and conferred only limited jurisdiction on the federal courts.

However, the final agreement with the Creeks (and Cherokees) unlike those of the Chickasaw and Choctaw Tribes, did not preserve the Tribal Courts. In fact, the Creek Agreement specifically stated that nothing in the agreement would be construed as reviving the Creek Tribal Courts which had been abolished by former acts of Congress. It also provided for the termination of the entire Creek government by March 4, 1906. Act of March 1, 1901, ch. 676, 31 Stat. 861. Difficulty in completing tribal rolls and resistance to allotment prevented the demise of the government and on April 26, 1906, Congress extended

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[3] The Dawes Commission reached an agreement with the Seminoles.

[4] We are advised by the parties that the Cherokees had refused to negotiate even a tentative agreement.

indefinitely the existence and government of each of the Five Tribes. Act of April 26, 1906, 34 Stat. 137. This Court has specifically held that the Creek government persisted. *Harjo v. Andrus,* 581 F.2d 949, 951 (D.C. Cir. 1978).

In 1934, Congress passed the Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461 *et seq.* (1983)), which provided for self-government pursuant to constitutions and permitted the tribes to organize for economic purposes pursuant to corporate charters. Certain tribes, primarily those in Oklahoma and including the Creeks, were excluded from six of the provisions of the IRA including the sections dealing with self-government and corporate charters. The legislative history reflects that one reason for the exclusion was that the tribes had made progress toward assimilation and it was thought best not to encourage return to reservations.[5] The need for similar legislation for the Oklahoma tribes was to be explored further. 78 Cong. Rec. 11126 (1934); *See also A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Committee on Indian Affairs,* 74th Cong., 1st Sess. 9.

Two years later, Congress passed the Oklahoma Indian Welfare Act (OIWA). Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501 *et seq.* (1983)). That Act, like the IRA, provided for constitutional governments and corporate charters. However, the language used in the self-government provision of the OIWA differed from that of the IRA.

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[5] Senator Thomas of Oklahoma was also concerned that the IRA would reduce Oklahoma's property tax revenue. 78 Cong. Rec. 11126 (1934).

In 1979, the Tribe, pursuant to the OIWA, adopted a constitution providing for three separate branches of government, including a judiciary. In 1982, the Tribe passed an ordinance allowing Tribal Courts to enforce criminal and civil jurisdiction over Tribal members and subsequently sought funding from the BIA for the Tribal Courts and a law enforcement program. The BIA and Interior denied the request based on the Curtis Act's purported abolition of Tribal Courts together with the failure of the subsequent Creek Agreement or the OIWA to revive them. That denial precipitated this action. On cross-motions for summary judgment, the District Court ruled in favor of the Interior and the Tribe has appealed.

ANALYSIS

Abolition of the Tribal Courts

The Tribe first argues that the Curtis Act did not abolish Tribal Courts. Rather, it contends that the Curtis Act was designed only to force allotment and that Congressional intent to abrogate earlier treaties was not expressed with sufficient clarity. However, in our view, the Curtis Act unequivocally abolished the courts. That Act provided that, as of October 1, 1898 for the Creeks, "all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts. . . ." Act of June 28, 1898, 30 Stat. 495, § 28. The subsequent agreement with the Creeks specifically provided that the agreement would not be construed as reviving the Tribal Courts: "Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." Act of March 1, 1901, 31 Stat. 861, ¶ 47. It also contained a provision that it would have no

effect on treaty provisions except insofar as it was inconsistent with the treaty provision. *Id.* at ¶ 44.

The Tribe contends that the language abolishing Tribal Courts is without effect because it conflicts with an earlier treaty and a treaty cannot be abrogated by implication. *Cook v. United States,* 288 U.S. 102 (1933). That statement of law is unquestionably correct. " '[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Menominee Tribe v. United States,* 391 U.S. 404, 413 (1968) (quoting *Pigeon River Co. v. Cox Co.,* 291 U.S. 138, 160 (1934)). However, the abolition of the Tribal Courts was unambiguous. The language of both the Curtis Act and the Creek Agreement clearly expressed the intent to abrogate the power to have Tribal Courts inherent in the Tribe's power of self-government expressly reserved by earlier treaties. In addition, the Courts were not revived by the Act of April 26, 1906, 34 Stat. 137, which extended indefinitely the Creek Tribal government. That Act, by its own terms, extended only the "present" Tribal government. The Curtis Act and the Creek Agreement have expressly stripped the Tribe of the power to have courts and, therefore, that power was not part of the "present" Tribal government. However, that does not end our inquiry.

Effect of the OIWA

The Tribe also argues that even if its courts were abolished by the Curtis Act and the subsequent agreement, the OIWA repeals the earlier legislation and revives the Tribe's power to establish courts. The crux of this issue is the meaning and effect of § 503 of the OIWA together with the general repealer clause. Section 503 provides:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its

> common welfare and to adopt a constitution and bylaws. . . .

25 U.S.C. § 503. The corresponding section of the IRA provides:

> Any Indian tribe . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, ...
>
> In addition to all other powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: to employ legal counsel, . . . ; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.

25 U.S.C. § 476.

The Interior would have this Court read into the language of § 503 of the OIWA the same limitations *expressed* in the corresponding section of the IRA. In other words, Interior would like us to read § 503 as limiting the powers of the Oklahoma tribes to those powers vested by existing law (plus certain powers enumerated in the IRA).[6]

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[6] Interior wants this Court to hold that the OIWA restored no powers to the Creek government—that it simply reaffirmed the existing powers of the Tribe. This interpretation is belied by other courts' construction of the OIWA. In *Board of Commissioners v. Seber,* 318 U.S. 705 (1943), the Supreme Court noted that the Creek Nation had been authorized by the OIWA to "resume" some of its former powers. *Id.* at 718. In *Indian Country, U.S.A. v. Oklahoma Tax Commission,* 829 F.2d 967, 981 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Commission v. Muscogee (Creek) Nation,* No. 87-1068 (U.S. June 27, 1988), the Court noted that Congress had enacted the OIWA to "restore" governmental powers to the Oklahoma tribes. Together with *Harjo,* which held that the executive and legisla-

The District Court did so, stating that it would be anomalous to hold that the OIWA conveyed greater powers of self-government to the Oklahoma tribes than the IRA conveyed to other tribes.[7]

The IRA and the OIWA address the same subject, albeit for different tribes, and were enacted just two years apart. It is contrary to common sense as well as sound statutory construction to read the later, more general language to incorporate the precise limitations of the earlier statute. Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning. *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765-66 (3d Cir. 1970). If Congress had intended the tribal government provision to be identical to that in the IRA, it could have included a direct reference to the IRA in that provision as it did in the corporate charter provison. Indeed, Congress could have simply repealed the provisions of the IRA which exempted the Oklahoma tribes. It did neither. Therefore, it is necessary to examine the OIWA standing alone to determine if it repealed the abolition of Creek Tribal Courts.

The OIWA clearly does not *expressly* repeal the abolition of the Tribal Courts. It contains no reference to the Curtis Act or the related legislation. It does, however, unlike the IRA, contain a general repealer clause. Act of June 26, 1936, 49 Stat. 1967, § 9 (codified at 25 U.S.C. § 509 (1983)). Therefore, any repeal would be by implica-

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tive powers of the Creeks had never been lost, these cases support the conclusion that the OIWA "restored" the Creek's judicial powers.

[7] The District Court also notes that the "corporate charter" provision of the OIWA refers directly to the IRA and uses this to support its determination that the tribal government provision is also identical to the IRA provision. *Muscogee (Creek) Nation v. Hodel*, 670 F. Supp. 434, 443 (D.D.C. 1987).

tion. Generally, repeal by implication is not favored. *See e.g., United States v. Borden Co.,* 308 U.S. 188, 198 (1939). Under that general rule, statutes are repealed by a general repealer clause only if they conflict. *Kremer v. Chemical Construction Co.,* 456 U.S. 461, 469 (1982). However, the standard principles of statutory construction do not have their usual force in cases involving Indian law. *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). In that case, Congress passed a statute dealing with mining leases on Indian land. The Act contained no reference to taxation of royalties by the states and contained only a general repealer clause. An earlier statute had permitted taxation of the royalties by the states. Montana made the same argument Interior makes here—since the two statutes did not directly conflict, the provision allowing taxation had not been repealed and was therefore applicable to leases executed under the subsequent Act. The Court focused on two rules of statutory construction applicable in Indian law cases. First, it discussed the rule providing that states may tax Indians only where Congress has clearly manifested its consent to such taxation. The Court held that the statute did not meet this requirement. More importantly, the Court in *Blackfeet* went on to hold that the State's interpretation would not satisfy the rule *requiring statutes to be construed liberally in favor of the Indians.* The Court did not rest its holding on the repeal of the 1924 Act. Rather, it held that the taxation provision of the 1934 Act could not be implicitly incorporated into the 1938 Act and was therefore inapplicable to leases executed under the 1938 Act (although it remained in effect for leases executed under the 1924 Act).

Nevertheless, the Court's reasoning is instructive as to the application of the varying and conflicting rules of statutory construction. "[I]n [Interior's] view, sound principles of statutory construction lead to the conclusion that [the Curtis Act was not repealed by the OIWA]. [Interior]

fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . '[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 766. (citations omitted). If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA *must* be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it *must* be construed that way.[8]

The OIWA confers the power to adopt a constitution. Black's Law Dictionary defines constitution as:

> The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing and limiting the functions of its different departments, and prescribing the extent and manner of sovereign powers.

Black's Law Dictionary 282 (5th ed. 1979). The Regulations designed to implement both the IRA and the OIWA define constitution as follows:

> "Constitution" or "Constitution and Bylaws" means the written organizational framework of any tribe reorganized pursuant to a Federal statute for the *exercise of governmental powers.*"

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[8] It is for this reason that, while we have given careful consideration to Interior's interpretation of the OIWA, we do not defer to it.

25 C.F.R. § 81.1(g) (emphasis added).

Both definitions certainly encompass the power to create courts with general civil and criminal jurisdiction. The United States Constitution contains such powers and has undoubtedly been used as a model for tribal constitutions. Constitutions are vehicles of self-government. Inherent in self-government is the power to make laws and to create mechanisms to enforce them. *See United States v. Wheeler,* 435 U.S. 313, 320 (1978). It is therefore reasonable to conclude that the OIWA conferred all powers associated with self-government, limited of course by statutes of *general* applicability.

In addition, if a later act covers the whole subject of an earlier one and is clearly intended as a substitute, it will operate to repeal the earlier act. *Kremer,* 456 U.S. at 469. The OIWA was passed to "reorganize" the Oklahoma tribes. It did away with allotment and included a provision for establishing a tribal government. It appears to cover the "whole subject" of the earlier legislation. It would be absurd to hold that isolated portions of the Curtis Act and the Creek Agreement survive even though the statutory context in which they appeared—allotment and assimilation—has been stripped away by the OIWA.

The legislative history is scant. At the hearings, nothing was said about the tribal government section of the OIWA. There were some general statements describing the Act as the "clarification and equalization of the legal status" of the Oklahoma tribes. *See A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Committee on Indian Affairs,* 74th Cong., 1st Sess. 8. That indicates an intent that all of the Oklahoma tribes were to have the same legal status. An interpretation of the OIWA that permitted some Oklahoma tribes to have courts but not others would not comport with that intent.

Senator Elmer Thomas, Chairman of the Senate Committee on Indian Affairs, Chairman of the Subcommittee on the OIWA and the same Senator Thomas who had promoted exempting the Oklahoma tribes from the IRA, made the following statement at the beginning of the hearings on the OIWA:

> Having so many tribes, the policy in the past has been to legislate for each tribe individually. As a result, we have numerous laws on the statute books that apply only to Oklahoma Indians, and no one law will apply to more than one tribe as a rule. I do not believe that to be the best policy personally, [sic] I believe that a broad policy should be adopted, and then where necessary, provide special legislation to take care of any particular item that may arise.

A Bill to Promote the General Welfare of the Indians of the State of Oklahoma and for Other Purposes: Hearings on S. 2047 Before the Senate Committee on Indian Affairs, 74th Cong., 1st Sess. 10. That statement certainly indicates an intent that the piecemeal legislation, i.e., those statutes applicable to only one or a few tribes, be done away with and a uniform law passed. Reading the OIWA as Interior would have it read would result in a perpetuation of the piecemeal legislation rather than its elimination. The very existence of the Curtis Act conflicts with the purpose of eliminating piecemeal legislation.

The Interior points to some statements in the legislative history which purportedly indicate that the OIWA was intended to confer the same powers on the Oklahoma tribes conferred on other tribes by the IRA. In other words, Interior contends that the OIWA was intended to be "identical" to the IRA and therefore limit the tribes' powers to those vested by existing law. Indeed, the legislative history states that the OIWA would "permit the Indians of Okla-

homa to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]." H.R. Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936). However, that statement is ambiguous at best. It could easily be read as expressing the intent that the Oklahoma Indians have the same powers as all other tribes, regardless of the source of those powers. If the intent of the OIWA was to give the Oklahoma tribes the same powers of self-government *exercised* by the IRA tribes, then the OIWA necessarily repealed the Curtis Act. "[T]ribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its own members for infractions of tribal law would detract substantially from tribal self-government. . . ." *Wheeler,* 435 U.S. at 332. (footnote omitted).

Although not critical to our decision, the Court is cognizant that, under current law, the State of Oklahoma has no jurisdiction over Indians within the bounds of the Creek "Indian Country." [9] *State v. Brooks,* No. S-85-117 (Okla. Crim. App., Nov. 7, 1986); *see also Indian Country, U.S.A. v. Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987), *cert. denied sub nom. Oklahoma Tax Commission v. Muscogee (Creek) Nation,* No. 87-1068 (U.S. June 27, 1988). Nor do the federal courts have jurisdiction over minor Indian on Indian crime within Indian Country.[10] "When there is a crime by an Indian against another Indian within Indian country only those

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[9] "Indian Country" is defined in 18 U.S.C. § 1151.

[10] There is one narrow exception to this general rule. Where an Indian defendant has been charged with one of the crimes enumerated in the Major Crimes Act, 18 U.S.C. § 1153, he is entitled to an instruction on lesser included offenses. If convicted of a lesser included offense, the conviction is a valid one. *Keeble v. United States,* 412 U.S. 205 (1973); *United States v. John,* 587 F.2d 683 (5th Cir. 1979).

offenses enumerated in the Major Crimes Act [18 U.S.C. § 1153] may be tried in federal courts." *United States v. Welch,* 822 F.2d 460, 464 (4th Cir. 1987) (citing *United States v. Antelope,* 430 U.S. 641 (1977)). To construe the OIWA as the Interior wants us to could result (until some change in the law) in a jurisdictional "no man's land."

The District Court aptly noted that this issue is not free from doubt. The legislative history is not clear and the language of § 503 can easily be construed as permitting the establishment of Tribal Courts. For this very reason, this Court must construe the OIWA to benefit the Tribe. *Blackfeet,* 471 U.S. at 766. Accordingly, we hold that the Curtis Act was repealed by the OIWA and that therefore the Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes *generally* applicable to *all tribes.*[11]

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[11] Because this Court has determined that the provision of the Curtis Act which abolished tribal courts has been repealed by the OIWA, it is unnecessary for us to reach the Tribe's argument that the Curtis Act was a Bill of Attainder.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 85-2668

THE MUSCOGEE (CREEK) NATION, PLAINTIFF

v.

DONALD HODEL, SECRETARY OF THE INTERIOR, DEFENDANT

Sept. 30, 1987

MEMORANDUM

OBERDORFER, District Judge.

In *Harjo v. Kleppe*, 420 F.Supp. 1110 (D.D.C.1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C.Cir.1978), this Court extensively reviewed the history of the federal government's relations with the Muscogee (Creek) Nation, an Indian tribe located in the state of Oklahoma, and concluded that

> despite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.

420 F.Supp. at 1118. Accordingly, the court determined that the Secretary of the Interior and other federal officials had acted illegally in recognizing the Principal Chief of the Creeks as the sole embodiment of their Nation. *Id.*

at 1142. In order to ensure that the tribe could effectively assert its right to democratic self-government in the future, the court created a five member commission to supervise the reorganization of the Creek government under a new constitution. *Id.* at 1143-47. Following the decision in *Harjo*, the Muscogee Nation held an election at which a majority of the tribe's voting members ratified a new constitution. This constitution was approved by the Secretary of the Interior on August 17, 1979.

The Muscogee constitution provides for a tripartite government containing executive, legislative and judicial branches. Article VII, Section 1 of the constitution provides that

> The judicial power of the Muscogee (Creek) Nation shall be vested in one Supreme Court limited to matters of The Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain.

In 1982, the Muscogees adopted a judicial code establishing a tribal court system with general civil and criminal jurisdiction over tribally enrolled citizens of the Nation. *See* Administrative Record ("AR"), Exhibit 3, Document 4. The present dispute arose when the tribe applied to the Bureau of Indian Affairs for funding for their courts and law enforcement agency. On April 6, 1983, the Bureau denied the request for funding on the ground that the tribe was precluded from exercising either civil or criminal jurisdiction by virtue of the Curtis Act of 1898. Act of June 28, 1898, ch. 517, 30 Stat. 495. *See* AR, Exhibit 3, Documents 7 & 8. This decision was appealed by the Muscogees on May 12, 1983 and was affirmed by the Interior Board of Indian Appeals ("the Board") on July 22, 1985. The Board's decision addressed the following legal questions:

> Did Congress deprive the Creek Nation of general civil and criminal judicial authority, and, if so, has such authority been returned to the tribe?

13 IBIA 211, 219 (1985). The Board concluded that "the Nation's civil and criminal judicial authority was abolished by acts of Congress and has not been restored." *Id.* at 220.

This action for declaratory and injunctive relief was filed on August 21, 1985. Although plaintiff's complaint states eight separate claims for relief, plaintiff's more recent pleadings appear to acquiesce in defendant's contention that this is an action for judicial review of the Board's decision pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* *See* Response in Support of Plaintiff's Motion for Summary Judgment and In Opposition to Defendant's Motion for Summary Judgment at 3. This Court has jurisdiction over this action by virtue of 5 U.S.C. § 702.[1] Review is limited to determining whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A). Generally speaking, agency action is entitled to considerable deference, especially when the action at issue involves the construction of a statute which specifically affects the agency. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This rule of deference is grounded in the recognition that the agency usually has considerable expertise in the controversies placed before it. When, however, an agency is asked to determine the scope and meaning of several acts of Con-

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[1] That statute provides, in part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

gress which are separate from the statute under which the agency itself is established or which the agency is charged with administering, the case for deference is weakened. *See Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914 (3d Cir.1981). In this case, both the agency and the court are called upon to answer the "narrow legal questions," *see* 13 IBIA at 219, whose resolution depends upon the interpretation of several acts of Congress. There is no reason to believe that the agency will be in a better position than the court to consider the relevant legislative history and to apply the appropriate rules of statutory construction. The opinion of the Indian Bureau of Appeals concerning these questions is entitled to careful consideration. But that opinion cannot survive a judicial determination based on an independent examination of the record that the Board's decision is not "in accordance with law." 5 U.S.C. § 706. *See I.N.S. v. Cardoza-Fonseca,* ____ U.S. ____, 107 S.Ct. 1207, 1220-21, 94 L.Ed. 2d 434 (1987).

I.

The case is currently before the Court on cross motions for summary judgment. There are no material facts in dispute. In order to determine whether the Board's decision not to fund the Muscogee court system was or was "not in accordance with law," it is necessary to examine briefly the history of the federal government's relations with the Creek Nation.[2]

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[2] The following description of the history of the Creek Nation as it relates to the issues before the Court relies heavily on the defendant's Statement of Material Facts which has been adopted by the plaintiff, and on the opinion of Judge Bryant in *Harjo v. Kleppe, supra.* The *Harjo* decision cited extensively to A. Debo, *And Still The Waters Run* (Gordian Press, Inc., 1966), and A. Debo, *The Road to Disappearance* (Univ. of Oklahoma Press, 1941).

When European settlers arrived in America, the Creek Nation occupied a large territory in the present states of Georgia, Alabama and Florida. From time to time over more than a century, beginning in 1707, the tribe was forced to cede portions of its territory to Great Britain, to the American colonies, and ultimately to the United States. Finally, in 1832, the portion of the Creek Nation of which plaintiff is a part ceded all lands east of the Mississippi River and moved to an area in the present state of Oklahoma. Because of their cultural and political sophistication, the Creeks and four other Indian Tribes who were removed to Oklahoma became known as the Five Civilized Tribes. *See* 420 F.Supp. at 1119.

The Creek Removal Treaty of March 24, 1832, which formalized this move, guaranteed the Creek Nation the right to perpetual self-government. 7 Stat. 366. While two later treaties continued to erode the boundaries of the Creek Nation at its Oklahoma site, both treaties reaffirmed the groups' right to self government. *See* Treaty with Creeks and Seminoles of August 7, 1856, 11 Stat. 699; Treaty with the Creeks of June 14, 1866, 14 Stat. 785.[3] In 1867, the Creek Nation established a constitutional form of government which included a separation of powers into executive, legislative and judicial branches. Judge Bryant previously described the Creek court system established by this constitution in the following terms:

> The constitution also created a court system, whose jurisdiction was limited to Creek citizens. The nation was divided into six districts; each had a judge elected by the Council. The district court tried all criminal cases and minor civil cases and trial by jury was pro-

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[3] The 1866 treaty ceded to the United States the western half of the Indian domain as a penalty for the tribe's alliance with the Confederacy during the Civil War. *See* 420 F.Supp. at 1119-20.

> vided. There was a Supreme Court of five justices chosen by the Council for four year terms, which tried all civil cases where the amount in controversy exceeded one hundred dollars.

420 F.Supp. at 1120.

In the last few decades of the nineteenth century, the Creek Nation faced a number of problems which were caused by a dramatic increase in the number of white settlers living illegally in the Indian Territory. The white settlers sought an end to the traditional Creek system of land ownership which provided that all land was held by the tribe communally and reverted to the nation upon the death of a member who was cultivating it. *See id.* at 1121. Indeed, expansion in the entire western area of the United States lead to pressure in Congress for a new Indian land policy called "allotment." *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 127-144 (1982). Under the allotment system, individual members of the tribe were given separate plots of land which were transferrable to non-members. Proponents of allotment argued that individual plots would be a more efficient means of agriculture and would therefore provide surplus land for white settlers. *See id.* at 128. Allotment was also justified as a means of assimilating Indians into white culture. *Id.* at 128-29. In response to this pressure, Congress passed the General Allotment Act of February 8, 1887, Ch. 119, 24 Stat. 388 (as amended and codified at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381). However, the five Civilized Tribes, including the Creek Nation, were excluded from the application of this Act. *See id.* at § 8; 24 Stat. 391 (codified at 25 U.S.C. § 339).

The increasing number of white settlers also presented problems for the Creek courts in the late nineteenth century. The fact that the Creek court system had no jurisdic-

tion over white settlers meant that "[c]rime flourished, the payment of debts was unenforceable." 420 F.Supp. at 1121. In response to this breakdown in judicial effectiveness, Congress created a special federal court with exclusive jurisdiction over all federal criminal offenses committed within the Indian Territory not punishable by death or by imprisonment at hard labor, and over certain civil cases. Act of March 1, 1889, Ch. 333, 25 Stat. 783. However, the Act provided no civil jurisdiction over controversies "between persons of Indian blood only," *id.* at § 6, 25 Stat. 784, and made most of the statutes enumerating federal crimes inapplicable to "offenses committed by an Indian upon the person or property of another Indian," *id.* at § 27, 25 Stat. 788. One year later, in May of 1890, Congress created the Oklahoma Territory out of the western portion of the Indian Territory and established a new territorial government. Act of May 2, 1890, Ch. 182, 26 Stat. 81. At the same time, Congress terminated the jurisdiction of the Special United States Court in the Oklahoma Territory, *id.* at § 29, 26 Stat. 93, but broadened its jurisdiction in the remaining area of the Indian Territory to all civil cases except cases over which the tribal courts had exclusive jurisdiction and to all contract cases to which an Indian was a party. *Id.*

At the same time that it was acting to create a parallel court system in the diminished Indian Territory, Congress moved to enforce the now prevailing policy of allotment of tribal lands. In 1893, Congress created the Dawes Commission and delegated to it the responsibility for negotiating allotment agreements with the five civilized tribes in the Oklahoma area. Act of March 3, 1893, Ch. 209, 27 Stat. 612. This Commission was unsuccessful over the next few years in reaching voluntary allotment agreements with the members of the five tribes. *See* 420

F.Supp. at 1122. The resistence of the Creeks to the allotment policy was summarized by Chief Ispathecher who stated

> I think it far better for us to stand firm by the treaties we have, and plead the justice of our cause by all lawful and honorable means, than enter into this agreement. I fail to see any betterment of our condition by this agreement, but to the contrary, I can see much that will be to our detriment.

Resolution of the Creek National Council, October 18, 1897, S. Doc. No. 34, 55th Cong., 2nd Sess. (1897) at 11-12. As a result of the tribes' refusal to negotiate with the Dawes Commission, pressure mounted in Congress for the forcible abolition of tribal status. 420 F.Supp. at 122.

The Indian Department Appropriations Act of 1897 contained several provisions which were designed to induce the individual tribes to negotiate with the Dawes Commission. For examine, the Act required that after January 1, 1898, all laws passed by the National Councils of the five civilized tribes would be subject to Presidential veto except "resolutions for adjournment," or any acts relating to negotiations with the Dawes Commission. 30 Stat. at 84. More importantly, the Act expanded the jurisdictional of the Territorial United States Court to all civil cases and all criminal cases arising after January 1, 1898, but provided that any agreement between the Dawes Commission and one of the tribes would "operate to suspend any provisions of this Act if in conflict therewith as to said Nation." 30 Stat. at 83-84.

Finally, on June 28, 1898, Congress passed the Curtis Act which provided for forced allotment and eventual termination of the tribal tenure unless the tribes ratified the outstanding proposed allotment agreement. Act of June 28, 1898, ch. 517, 30 Stat. 495; *see* 420 F.Supp. at 1122.

The Act forebade the enforcement of the tribal law in the Special United States Court in the Indian Territory and pronounced that effective July 1, 1898 "all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same." 30 Stat. 505.

As an inducement to the adoption of an allotment agreement, Congress delayed until October 1, 1898, the implementation of the provision abolishing tribal courts for the Chickasaw, Choctaw, and Creek tribes. Under the pressure of the Curtis Act, the Creeks entered into an allotment agreement with the Commission which provided for the reorganization of the Creek courts. *See* Creek Agreement of February 1, 1899, House Doc. No. 252, 55th Cong., 3d Sess. (1899) at 8. However, Commissioner Dawes refused to sign this agreement, *id.* at 13, and the agreement that was eventually ratified by Congress on March 1, 1901 specifically provided that "Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." Act of March 1, 1901, ch. 676, 31 Stat. 861, 873. The provisions of this Allotment Act were ratified by the Creek National Council on May 25, 1901 and proclaimed by President William McKinley on June 25, 1901. AR, Exhibit 27, 13 IBIA 218. Although this act provided that the tribal government of the Creek Nation should not continue after March 4, 1906, Congress provided five years later for the continuing existence of limited tribal governments with the Five Tribes, but made no provision for a tribal court system. Act of April 26, 1906, ch. 1876, 34 Stat. 137.[4]

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[4] For an analysis of this Act and its effect on the political organization of the Creek Tribe, *see Harjo*, 420 F.Supp. at 1126-30.

During the administration of President Franklin D. Roosevelt, the policy of allotment came under criticism and Congress moved to preserve and restore traditional Indian forms of land ownership and organization. *See generally* Cohen, *supra*, at 144-47. The cornerstone of the new federal policy was the Indian Reorganization Act ("IRA" or "1934 Act") which was passed by Congress in 1934. Act of June 18, 1934, ch. 576, 48 Stat. 984 (as amended and codified at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-70, 471-73, 474, 475, 476-78, 479). The IRA embodied a comprehensive plan to improve the economic status of Indians and to strengthen the self-government of the remaining tribes while decreasing the influence of the Department of the Interior over tribal affairs. In order to achieve these goals, the IRA made the alienation of Indian lands more difficult, provided for acquisition of land for the landless, vested tribes with political authority, established a system of financial credit, provided funds for college and technical training and helped Indians gain jobs on the reservations. *See* 78 Cong.Rec. at 11123 (Remarks of Senator Wheeler).

Due to the intervention of Senator Thomas of Oklahoma, however, all of the Oklahoma Indians were excluded from the provisions of the 1934 Act. *See* 25 U.S.C. § 473. Senator Thomas argued that the philosophy behind the Indian Reorganization Act did not apply in Oklahoma where the Indians were relatively assimilated into the culture of the state. In addition, Senator Thomas was apparently concerned that the 1934 Act would decrease state property tax revenues. *See* 78 Cong.Rec. at 11126 (Remarks of Senator Thomas).

Two years later, however, Congress passed the Oklahoma Indian Welfare Act ("OIWA" or "1936 Act") which granted to the Indians of Oklahoma many of the

benefits extended to other tribes by the Indian Reorganization Act. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. § 501-09). Section 3 of this Act specifically provides that "[a]ny recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of the Interior may prescribe." 25 U.S.C. § 503. When the Muscogee Nation reorganized its government following the decision in *Harjo*, it adopted its constitution in accordance with this statutory authorization and received the approval of the Secretary of the Interior. However, that approval expressly stated that "nothing in this approval shall be construed as authorizing any action under the constitution that would be contrary to federal law." *See* AR, Exhibit 3, Document 2.

II.

Plaintiff has advanced two arguments why the Muscogee Nation retains its inherent civil and criminal jurisdiction despite the provisions of the 1898 Appropriations Act, the Curtis Act and the Act of March 1, 1901.[5]

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[5] Plaintiff has also argued in its brief that the Curtis Act is an "unlawful bill of attainder." There is good reason to believe that this constitutional challenge to an Act of Congress over eighty years after its enactment has not been raised in a timely fashion and is therefore not properly before the Court. Moreover, the legislative history demonstrates that the abolition of the Creek courts was not accomplished solely for a punitive purpose but rather was part of a comprehensive plan designed to further the prevailing policy of assimilation. *See infra* at 441. In light of Congress' plenary power over Indian affairs, laws implementing this policy were not beyond the Congress' legislative authority.

Plaintiff also suggest that "[t]he victory in *Harjo* should control the outcome of this litigation under the doctrine of *res judicata*." Memo-

First, plaintiff argues that these statutes were not intended to extinguish forever the tribe's power to exercise judicial authority over tribal members. Second, plaintiff argues that the Oklahoma Indian Welfare Act repealed any prior acts which interfered with its right to maintain a tribal court system. These arguments will be considered in turn below.

It is one of the essential principles of Indian law that unless abrogated by a contrary law, Indian tribes possess inherent powers of sovereign nations including the right to self-government. *See United States v. Wheeler*, 435 U.S. 313, 322-23, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978). Included within this right to self-government is the right to enforce the criminal and civil laws of the tribe. *See id.* at 322-26, 98 S.Ct. at 1085-87. Moreover, it is undisputed that the early treaties between the Creek Nation and the federal government explicitly provided for continuation of the Creek's tribal government. *See, e.g.*, Creek Treaty of March 24, 1832, 7 Stat. 366, 368. For example, the 1856 Treaty provided, in part, that "the Creeks . . . shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits." Treaty with Creeks and Seminoles, 11 Stat. 699, 703-04.

Nonetheless, the undisputed evidence also shows that the federal government did not fully honor these promises to the Creek Nation; instead, in the late nineteenth and early twentieth century, Congress encroached significantly upon the tribe's inherent and treaty-based rights to self government in an effort to advance the prevailing policy

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randum in Support of Plaintiff's Motion for Summary Judgment at 2. This suggestion must be rejected; the opinion in *Harjo* dealt solely with the political organization of the tribe, and more specifically, with the power of the Creek National Council to authorize the allocation of tribal funds; it did not speak to the vitality of the Creek tribal courts, or the reality or vitality of the Act of Congress which abolished them.

of assimilation. And while the policy and the means by which it was advanced may be questioned today, there can be no question that Congress possessed the plenary power to alter or suspend the provisions of earlier treaties by duly enacted legislation. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566-68, 23 S.Ct. 216, 221-22, 47 L.Ed. 299 (1903); *Blake v. Arnett*, 663 F.2d 906, 910 (9th Cir.1981); *Rosebud Sioux Tribe v. Kneip* 521 F.2d 87, 98 (8th Cir.1975), *aff'd*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). Unlike the Constitution, acts of Congress which conflict with contemporary policy preferences can be changed by Congress.

While it does not explicitly argue that Congress lacked the power to abrogate the early treaties when it enacted the Curtis Act and the related legislation, plaintiff argues that Congress' intent to abandon those treaties was not expressed with sufficient clarity. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13, 88 S.Ct. 1706, 1710-11, 20 L.Ed.2d 697 (1968). But the provision of the Curtis Act which abolished the Creek tribal courts was unambiguous. As noted above that statute states that "all tribal courts in Indian territory shall be abolished." Under these circumstances, "[t]he intent to abrogate inconsistent treaty rights is clear enough from the express terms of [the Act]." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n. 22, 99 S.Ct. 740, 750 n. 22, 58 L.Ed.2d 740 (1979). And while the statute itself does not refer to the earlier treaties with the Creeks, the legislative history of the Act demonstrates that Congress was well aware of the conflict with these treaties. *See* 31 Cong.Rec. 5593 (1898) (remarks of Senator Bate) (noting that the Curtis Act "sweeps all the laws of the Indians away, all their courts of justice, all their juries, all their local officers, and all the rights they have under the

treaties they have been given and guaranteed by the government of the United States.")

Plaintiff argues with some force that this provision of the Curtis Act and the related provisions of the 1898 Appropriations Act was intended to force the Creeks to enter into an Allotment Agreement. The record of the Senate debates demonstrate that the Congress was aware that these provisions might encourage the tribes to negotiate allotment agreements with retained the tribal courts.[6] For example, Senator Berry, a supporter of the 1898 Appropriations bill, noted

> As I said before, if this provision is retained in regard to the courts, I have no doubt but what within six months or a year treaties will be made in regard to allotments and all the rights of the Indians will be protected; but if the legislation be defeated, the Senator will find that there will be no agreement of any kind with the Dawes Commission. If the Senate desire a suitable settlement of this matter, to which both sides agree, it will keep this provision in the bill in regard to the abolition of the Indian courts . . .

29 Cong.Rec. 2324 (1897) (remarks of Senator Berry); *see also* 31 Cong.Rec. 5588 (remarks of Mr. Jones). Nonetheless, no agreement was reached before the October 1, 1898 deadline imposed by the Curtis Act. Moreover, the agreement which was eventually ratified by Congress in March of 1901 explicitly reiterated that the tribal courts had been abolished and were not revived by the Act. Act of March 1, 1901, ch. 676, 31 Stat. 861, 873. While the abolition of the tribal courts was, in part, "a bludgeon with which to brain the Indian," *see* 29

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[6] Indeed, the Seminole tribe did negotiate an allotment agreement which expressly preserved the jurisdiction of its tribal courts. *See* Act of July 1, 1898, ch. 542, 30 Stat. 567, 569.

Cong.Rec. 2310 (1897) (remarks of Senator Bate), it was also part of a comprehensive plan to assimilate Indians into white culture. Thus, having finally won the allotment treaty, Congress refused to return the tribal courts. As Commissioner Dawes stated when he rejected an agreement that sought to restore the tribal courts,

> the presence of the old courts with any jurisdiction and with all the scandals attached to them seems to me an unnecessary step backward. . . . I feel that it is the duty of the Government to keep its face steadily to the future and take no step backward.

House Doc. No. 252, 55th Cong., 3d Sess. (1899) at 13. It is therefore clear that Congress knowingly and intentionally altered the provisions of the earlier treaties and explicitly abolished the traditional tribal courts of the Creek Nation.

The history of the Creek Nation did not end, however, with the ratification of the allotment treaty in 1901. For the purposes of this dispute, the most significant development came in 1936 with the passage of the Oklahoma Indian Welfare Act. As was discussed above, this act was intended to extend to the Indian tribes of Oklahoma many of the benefits provided to non-Oklahoma tribes by the Indian Reorganization Act of 1934. The main provisions of the OIWA establish a plan to purchase land for Oklahoma Indians who had lost their property through the allotment process. *See* 25 U.S.C. §§ 501-02. In addition, the Act allowed Indians to organize for both political and economic purposes. Section 3 of the Act provided as follows:

> Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary of

> the Interior may prescribe. The Secretary of the Interior may issue to any such organization a charter of incorporation, which shall become operative when ratified by a majority vote of the adult members of the organization voting: *Provided, however,* That such election shall be void unless the total vote cast be at least 30 per centum of those entitled to vote. Such charter may convey to the incorporated group, in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma, the right to participate in the revolving credit fund and to enjoy any other rights or privileges secured to an organized Indian tribe under the Act of June 18, 1934 (48 Stat. 984) [the Indian Reorganization Act]; *Provided,* That the corporate funds of any such chartered group may be deposited in any national bank within the State of Oklahoma or otherwise invested, utilized, or disbursed in accordance with the terms of the corporate charter.

25 U.S.C. § 503 (emphasis in original). Section 9 of the OIWA provides, in part, that "[a]ll Acts or parts of Acts inconsistent herewith are hereby repealed." 25 U.S.C. § 509.

Plaintiff contends that, in light of the repealer clause of § 9, that Act should be construed to repeal the earlier legislation that outlawed the Muscogee courts. In order to determine whether the OIWA revived the traditional Creek courts, it is necessary to determine what powers that Act provided for tribes that organized under its provisions. The Act specifies that tribes may adopt a constitution and that any tribe which has done so may apply to the Secretary of the Interior for a "charter of incorporation."[7]

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[7] For a description of the differences between tribal constitutions and charters of incorporation, *see S. Unique, Ltd. v. Gila River Pima-*

Unlike the IRA of 1934, the OIWA of 1936 does not specifically enumerate the powers which may be vested in a tribe by a constitution adopted pursuant to its provisions. It might therefore be argued that a tribal constitution adopted pursuant to the OIWA may convey all the usual attributes of constitutional government, including the power to create a judical branch, regardless of whether the tribe retained these powers under "existing law" in 1936.

However, both parties to this suit have maintained that the OIWA was intended to convey to the Indians of Oklahoma the same rights conveyed to other tribes by virtue of the IRA. *See, e.g.,* Plaintiff's Supplemental Memorandum in Response to the Court's December 23, 1986 Notice to Counsel at 3; Defendant's Supplemental Memorandum in Response to the Court's December 23, 1986 Notice to Counsel at 7-8. This interpretation of the OIWA is amply supported by the legislative history. *See, e.g.,* H.R.Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936) (stating that the OIWA "will permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the Indian Reorganization Act of June 18, 1934"). The IRA provides that a constitution adopted by a tribe shall vest in the tribe "all powers vested in any Indian tribe or tribal counsel *by existing law*" and well as certain other powers which are not relevant here. 25 U.S.C. § 476 (emphasis added). It would be anomalous to hold that the OIWA conveyed to the Indians of Oklahoma greater powers of self-government than the IRA granted to other tribes in view of the fact that the Oklahoma Indians were excluded from the 1934 Act because "the Oklahoma In-

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Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376, 1371-82 (App.1983).

dians having made progress beyond the reservation plan, it was thought best not to encourage a return to reservation life." *See* S.Rep. No. 1232, 74th Cong., 1st Sess. 6 (1935). Finally, the OIWA does specify that any tribe which receives a charter of incorporation may exercise, "in addition to any powers which may properly be vested in a body corporate under the laws of the State of Oklahoma,"[8] the right to "enjoy any other rights or privileges secured to an organized Indian tribe under [the provisions of the IRA]." 25 U.S.C. § 503. Since this provision refers to the entire IRA, and not solely to those portions that relate to incorporated associations, Congress must have intended thereby to delineate the powers which could be exercised under a tribal constitution as well as the powers which could be conferred by a charter of incorporation.

Once it is assumed that the OIWA conferred the same governmental powers as the IRA, it follows that that Act could not have been intended to revive tribal court systems which had been abolished by Act of Congress. The explicit reference to "existing law" in the IRA makes it unmistakably clear that while the Congress intended to effect a reorganization of existing tribes, it did not intend to reestablish all of the elements of tribal sovereignty that had been abridged by prior legislative action. *Cf. United States v. Wheeler*, 435 U.S. at 328, 98 S.Ct. at 1088 (holding that the IRA did not "*creat[e]* the Indians' power to govern themselves and their right to punish crimes com-

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[8] It might be argued that the term "body corporate" refers to municipal corporations and that the Muscogees would be entitled to create a "Municipal Court" under Okla. Stat., tit. 11, § 27-101 if they were to apply for a charter of incorporation. However, the legislative history of the OIWA and of the IRA demonstrate that the "body corporate" is intended to be a business corporation rather than a municipal corporation. *See, e.g.*, 78 Cong.Rec. 11123 (1934) (remarks of Representative Wheeler).

mitted by tribal offenders. Indeed the [IRA] . . . recognized that Indian tribes already had such power under "existing law.") (emphasis in original). Of course, Congress did vest the reorganized tribes with certain specified powers (such as the power to employ legal counsel) which may have been abolished for some of the tribes by 1934. As to these limited powers, the 1934 Act did repeal earlier legislation. But the jurisdiction of the Indian Courts has been a matter of such importance in the history of federal relations with the Indian tribes that it is not likely that Congress would have failed to include this power within the list of rights granted to reorganized tribes if it had intended to revive the abolished courts.

Under traditional canons of statutory interpretation, it is clear that the general repealer clause contained in § 9 of the OIWA cannot be construed to revoke the abolition of the Creek's tribal courts. However, plaintiff notes that the Supreme Court has recently reemphasized that "standard principles of statutory construction do not have their usual force in cases involving Indian law." *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985). Instead, "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Id.* Plaintiff urges the Court to consider the effect of the OIWA in light of the Supreme Court's reminder that courts " 'are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.' " *Bryan v. Itasca County*, 426 U.S. 373, 388 n. 14, 96 S.Ct. 2102, 2111 n. 14, 48 L.Ed.2d 710 (1976) (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir.1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977)).

In *Montana v. Blackfeet*, the Court relied, in part, on a similar general repealer clause in the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a, *et seq.*, in declining to apply a 1924 Act which authorized taxation of Indian property. The 1924 Act provided that "the production of oil and gas and other minerals on such lands may be taxed by the states in which said lands are located." 471 U.S. at 763, 105 S.Ct. at 2402. The Indian Mineral Leasing Act of 1938, a comprehensive act designed to obtain uniformity in the leasing of tribal lands for mining purposes, did not authorize or forbid state taxation but did contain a general repealer provision. The Court found in that case that there was no "indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act." *Id.* at 767, 105 S.Ct. at 2404.

As the dissent in *Blackfeet* noted, the "majority apparently [did not] rest its . . . holding on the conclusion that the 1938 Act *repealed* the taxing authority contained in the 1924 Act." *Id.* at 769, 105 S.Ct. at 2405 (White, J., dissenting) (emphasis in the original). Rather, the Court held only that the taxing authority provided for in the 1924 Act did not apply to leases executed under the 1938 Act. This holding was based in part on the interpretation of the scope of the 1924 Act,[9] and was heavily dependent on the strong presumption that Indian lands are not subject to taxation. *Id.* at 766, 105 S.Ct at 2403. Moreover, the Acts at issue in this case are unlike the 1939 Act in *Blackfeet* because, in this case, Congress explicitly limited tribes

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[9] The Court found that the taxing provision of the 1924 Act extended only to leases executed under a 1891 Act and those executed under the 1924 Act. *Id.* at 767, 105 S.Ct. at 2404. According to the dissent, the 1924 taxing provision applied to all "unalloted lands on Indian reservations bought and paid for by the Indians and not needed for agricultural purposes." *Id.* at 770, 105 S.Ct. at 2405-06 (White, J., dissenting).

organizing under the IRA to the powers vested under "existing law" and failed to include the power to create tribal courts in the narrow list of additional powers. The *Blackfeet* case does not, therefore, stand for the proposition that courts are free to interpret a general repealer clause to abrogate earlier statutes that are not inconsistent.

III.

The record in this case therefore demonstrates that Congress did explicitly abolish the power of the Muscogee (Creek) tribe to maintain a court system with general civil and criminal jurisdiction and never acted to restore that power. This decision should not be construed, however, as a determination that the Muscogee tribe is precluded from establishing any court system whatsoever. The Interior Department has maintained that "[t]he tribe may properly assign to its courts the task of making [decisions concerning its internal affairs] on behalf of the tribe or of reviewing the procedural or substantive correctness of such decisions that are made by other tribal officials. A Creek court may exist for these purposes even though it may not punish individuals for criminal offenses or compel the resolution of disputes between private parties." *See* Memorandum of Paul T. Baird, January 12, 1984, AR, Exhibit 3, Document 13, at 11. This opinion is not to the contrary and merely holds that the defendant did not behave in a manner that was arbitrary and capricious or contrary to law when it denied funding for a Creek court system that purported to assert general civil and criminal jurisdiction.

There is no doubt that the policy of assimilation which inspired the Curtis Act had passed out of favor in the mid-thirties when the IRA and the OIWA were enacted. Nor is it the prevailing policy today. *See* Statement by the Presi-

dent, Indian Policy, 19 Weekly Comp.Pres.Doc. 98 (Jan. 24, 1983). There is also no question that the abolition of their traditional courts has interfered with the ability of the Creeks to exercise the rights of self-government which were consistently promised to them by the federal government. The hardships created by the Curtis Act were described by Chief Porter in a letter to the Congress in March, 1900:

> [m]any trivial matters can be settled among their own people and under their own laws, without delay and with but little expense; whereas when they are required to attend United States courts they are frequently taken a long distance from their homes and kept in attendance upon the courts from time to time, and from court to court, subjecting them to great loss of time and expense. Frequently, our citizens are deprived of their liberty by being unable to give bail at places remote from their homes.

Senate Doc. No. 324, 56th Cong., 1st Sess. at 13. While the particular problems described by Chief Porter may have been solved in the last 80 years, the abolition of their tribal courts undoubtedly remains a hardship for the Muscogee people. Furthermore, recent developments in the United States District Court of Oklahoma suggest that the Muscogees may find it difficult to enforce law in their territory unless they can establish courts with general civil and criminal jurisdiction. *See, e.g., Indian County, U.S.A., Inc. v. Oklahoma*, No. 85-C-643-E (consolidated with 85-C-658-E), mem. op. (N.D.Okla. April 24, 1986).

The issue here presented is not free from doubt. There is published opinion, for example, that

> Congress has the power to abolish [tribal] courts by exercise of its plenary authority to deal with the tribes. But Congress also has the power to enhance

> the authority of the tribe and might by a legislative act create the authority for a tribe to act in an area previously withdrawn from its jurisdiction. Thus, even though a tribal court may have been abolished, the constitutional and charter provisions of the IRA/OIWA grant authority for a tribe to define its organizational context, which would include the reassertion of tribal judicial powers

Pipesteam & Rice, *The Mythology of the Oklahoma Indians: A Survey of the Legal Status of Indian Tribes in Oklahoma,* 6 Am.Indian L.Rev. 259, 306 n. 151 (1978). But in the present state of the law, it is to Congress, the body that abolished the Muscogee courts, and not to the courts, that plaintiff must look for a remedy.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 30th day of September, 1987, hereby

ORDERED: that defendant's motion for summary judgment is GRANTED; and it is further

ORDERED: that plaintiff's motion for summary judgment is DENIED.

APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

IBIA 84-15-A

MUSCOGEE (CREEK) NATION

v.

ACTING AREA DIRECTOR, MUSKOGEE AREA OFFICE,
BUREAU OF INDIAN AFFAIRS

Decided July 22, 1985

Appeal from a decision of the Bureau of Indian Affairs denying funding for appellant's courts and law enforcement agency.

Affirmed.

1. Indians: Law and Order: Civil Jurisdiction—Indians: Law and Order: Criminal Jurisdiction

   The general civil and criminal judicial authority of the Muscogee (Creek) Nation was abolished by act of Congress, and was not restored by the Oklahoma Indian Welfare Act of 1936.

APPEARANCES: Geoffrey Standing Bear, Esq., Jenks, Oklahoma, for appellant; David C. Etheridge, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; Susan Work Haney, Esq., Oklahoma City, Oklahoma, for amicus curiae, Tookparfka Tribal Town. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

On January 27, 1984, the Board of Indian Appeals (Board) received a request from the Muscogee (Creek) Nation (appellant) to assume jurisdiction over an appeal filed with the Deputy Assistant Secretary—Indian Affairs (Operations). Appellant sought review of a decision issued by the Bureau of Indian Affairs (BIA) denying funding for its courts and law enforcement agency. The stated basis for the denial was an April 20, 1978, memorandum issued by the Associate Solicitor, Division of Indian Affairs, U.S. Department of the Interior, which concluded that the Curtis Act of 1898, 30 Stat. 495, precluded appellant's exercise of civil and criminal jurisdiction within the former Indian Territory. For the reasons discussed below, the Board affirms the BIA decision.

Background

Prior to 1707, the Creek Nation occupied a large territory in what is now the States of Georgia, Alabama, and Florida. Between 1707 and 1773, tracts of this territory were ceded to Great Britain and the American colonies. Treaty cessions to the newly independent United States began in 1790. Under the Creek Removal Treaty of March 24, 1832, 7 Stat. 366, that portion of the Creek Nation to which appellant belongs was removed to an area in the present State of Oklahoma. Under the 1832 Treaty, appellant was guaranteed the right to perpetual self-government in the new territory. Similarly, the Creek Treaty of August 7, 1856, 11 Stat. 699, provides:

> Article IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and

second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

* * * * *

Article XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; excepting, however, all white persons, or their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; and all persons not being members of either tribe, found within their limits, shall be considered intruders.

Because of appellant's support of the Confederacy during the American Civil War, it was forced in 1866 to cede the western half of its territory to the United States. The Creek Treaty of June 14, 1866, 14 Stat. 785, however, still protected the integrity of the tribal government:

Article X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: *Provided, however,* [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs.

In 1867, appellant formed a constitutional government, with defined executive, legislative, and judicial branches.

In 1887, Congress passed the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1982). This Act provided for the allotment of lands within Indian reservations to individual Indians. Section 8 of the General Allotment Act, 25 U.S.C. § 339 (1982), specifically excluded the Creeks, among other tribes, from its provisions:

> The provisions of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order.

These exclusions show congressional recognition that the named tribes and areas were considered to be different from other Indian tribes and reservations.

In apparent recognition that the "full and free consent" provisions of the treaties with the Five Tribes (*i.e.*, Cherokee, Creek, Chockaw, Chickasaw, and Seminole) required approval from those tribes before allotment of their reservations could be achieved, Congress enacted numerous laws specifically addressed to the allotment of their lands. *See* Act of Mar. 1, 1889, 25 Stat. 783; Act of May 2, 1890, 26 Stat. 81; Act of Mar. 3, 1893, 27 Stat. 612, 645; Act of Mar. 1, 1895, 28 Stat. 693; Act of June 10, 1896, 29 Stat. 321, 329; Act of June 7, 1897, 30 Stat. 62, 83; Act of June 28, 1898, 30 Stat. 495; Act of June 6, 1900, 31 Stat. 657; Act of Feb. 18, 1901, 31 Stat. 794; Act of Jan. 21, 1903, 32 Stat. 774; Act of Feb. 19, 1903, 32 Stat. 841; Act of Apr. 28, 1904, 33 Stat. 573; Act of Apr. 26, 1906, 34 Stat. 137; Act of June 16, 1906, 34 Stat 267. In 1893, Congress cre-

ated the Dawes Commission (Commission) and gave it the responsibility of negotiating allotment agreements with the Five Tribes.

In 1897, Congress passed the Indian Department Appropriations Act for fiscal year 1898, Act of June 7, 1897, 30 Stat. 62. This Act gave Federal courts in Indian Territory original and exclusive jurisdiction to try all civil causes instituted after the passage of the Act and all criminal causes for any offenses committed after January 1, 1898. The jurisdiction of the Federal courts applied to both non-Indians and Indians.

The congressional debates over this bill indicated that the provisions usurping Indian civil and criminal jurisdiction would take effect only if the tribes did not ratify the allotment agreements negotiated with the Commission:

> I will state to the Senator, that we do not take away the right or the power to treat, but, on the contrary, we provide that if at any time they make a treaty [*i.e.*, allotment agreement], which is ratified by a tribe, this act [*i.e.*, the provision usurping civil and criminal jurisdiction] shall no longer apply to that tribe.

29 Cong. Rec. 2246 (1897, remarks of Senator Pettigrew).

> As I said before, if this provision is retained in regard to the courts, I have no doubt but what within six months or a year treaties will be made in regard to allotments and all the rights of the Indians will be protected; but if this legislation be defeated, the Senator will find that there will be no agreement of any kind with the Dawes Commission. If the Senate desire a suitable settlement of this matter, to which both sides agree, it will keep this provision in the bill in regard to the abolition of the Indian courts.

29 Cong. Rec. 2323-24 (1897, remarks of Senator Berry).

The Seminole Nation ratified an allotment agreement in late 1897. Seminole Agreement, Act of July 1, 1898, 30 Stat. 567. The Commission meanwhile continued to negotiate with the remaining four tribes. Agents of the Creeks, Choctaws, and Chickasaws negotiated agreements. The Cherokee Nation refused to negotiate even a tentative agreement. Consequently, Congress passed the Curtis Act of 1898, 30 Stat. 495. Section 28 of the Curtis Act states:

> That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided,* That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

Again, the legislative debates concerning this act reveal Congress' intent:

> The question of allotment comes up and the bill endorses the action of the Dawes Commission. It takes away from those Indians the courts that they have had under treaties, and every right almost they have of a political and legal character has been denied them. The bill goes on to approve the action in the past in that regard. I think the Senators owe it to themselves to look into it and to see to it, because the course of the Government toward those Indians has

> certainly been a source of much reprehension, and justly so.

29 Cong. Rec. 5582 (June 7, 1898, remarks of Senator Bates).

> Mr. President, the bill, beginning with Section 28, provides for the submission of the agreement which has heretofore been made between the Dawes Commission and the Indian tribes and for a settlement of all of these difficulties. The bill before us * * * looks to a disposition of all of these questions by the government of the United States. The Indians have not ratified this agreement. Their agents made the agreement with the Dawes Commission, and this provision of Section 28 is that in case they do ratify the agreement, then the terms of the agreement shall supersede the others and shall be enforced; but if it is not ratified, then the provisions of the bill before Section 29 shall become the law and be operative in that Territory.

29 Cong. Rec. 5588 (June 7, 1898, remarks of Mr. Jones).

The allotment agreements negotiated with the Choctaws and Chickasaws were ratified prior to the October 1, 1898, deadline established in section 29 of the Curtis Act. The Creek allotment agreement had been rejected by the Creek National Council prior to the passage of the Curtis Act. In rejecting the agreement, the Council had apparently followed the recommendation of Isparhecher, the Creek Principal Chief: "I think it far better for us to stand firm by the treaties we have, and plead the justice of our cause by all lawful and honorable means, than enter into this agreement." Resolution of the Creek National Council, Oct. 18, 1897, S. Doc. No. 34, 55th Cong., 2d Sess. (1897) at 11.

The Creeks continued to negotiate, and entered into a new agreement with the Commission on February 1, 1899, 4 months after the Curtis Act's deadline for the abolition of tribal courts. Commissioner Dawes refused to sign this agreement, and it was not ratified by Congress.

Negotiations continued, with the Creeks demanding protection and preservation of their courts and the Commission refusing to include such protections. A new agreement sent to Congress did not protect the tribal courts. The Creeks requested that an amendment protecting their courts be added in committee:

> But if this provision [protecting tribal courts] should not be incorporated in the agreement, it might be difficult to secure its ratification, and even if ratification were secured there would still be an element of discontent among the people by reason of the fact that they had been deprived of the limited jurisdiction which had been promised them * * *; and this would be a discrimination against the Creeks as to their capacity for self-government.

S. Doc. No. 324, 56th Cong., 1st Sess. at 13 (1900). The protection sought through amendment was not provided, and the agreement as ratified by Congress specifically retained the abolition of the Creek courts: "47. Nothing contained in this agreement shall be construed to revive or reestablish the Creek courts which have been abolished by former Acts of Congress." Act of March 1, 1901, 31 Stat. 861; ratified by the Creek National Council on May 25, 1901; proclaimed law by President William McKinley on June 25, 1901.

The present controversy essentially began in 1976 with the decision of the United States District Court for the District of Columbia in *Harjo* v. *Kleepe,* 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom., Harjo* v. *Andrus,*

581 F.2d 949 (D.C. Cir. 1978).[1] After reviewing the history of Federal relations with the Creek Nation, the court held that Congress had not disestablished the tribe, and that it would be allowed to reorganize under a new constitution. In accordance with the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967, 25 U.S.C. §§ 501-509 (1982), the Creeks held a constitutional election in 1979, and formed a new constitutional government. The Creek constitution, establishing a three-branch form of government, was approved by BIA the same year. The Creek Nation presently operates under this constitution.

In 1982, the Creek Nation began efforts to develop its court system. A judicial code was adopted, and funding was sought from BIA for its courts and law enforcement program. Through a letter dated April 6, 1983, the Department's field representative, Okmulgee Agency, BIA, informed the Nation that its law enforcement program would not be funded. The Nation's appeal of that decision, under 25 CFR Part 2, was transferred to the Board in accordance with 25 CFR 2.19(b). After initial briefing by the parties and by the amicus curiae, Tookparfka Tribal Town, oral argument was held before this Board on November 15, 1984.

Discussion and Conclusions

The issues raised in this appeal are narrow legal questions: Did Congress deprive the Creek Nation of general civil and criminal judicial authority, and, if so, has such authority been returned to the tribe? The Board has carefully reviewed in depth the extensive statements of history,

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[1] *Harjo* specifically considered whether the Creek executive and legislative branches had both survived, and found that they had. Creek judicial authority was not at issue in *Harjo*.

legislation, precedents, and arguments made by the parties and the amicus curiae. The Board is unable to find convincing legal support for the position of appellant. Therefore, while fully aware that the policies expressed in the Curtis Act and similar legislation have long been abandoned in favor of Indian self-determination, and that this decision will have an adverse and discriminatory effect on the Muscogee (Creek) Nation, the Board is constrained to find, as set forth in detail in the discussion below, that the Nation's civil and criminal judicial authority was abolished by acts of Congress and has not been restored.

From the preceding review of the circumstances and congressional debates surrounding the passage of the fiscal year 1898 Appropriations Act and the later Curtis Act, it appears clear that Congress understood and intended that the acts would destroy both the then-existing and future civil and criminal judicial authority of the Creek Nation, and would abrogate earlier treaties guaranteeing full tribal self-government. Although Congress' goal was to force allotment, not to destroy tribal judicial systems, the Creeks failed to reach an allotment agreement before the deadline established by Congress in the Curtis Act. The general jurisdiction of the Creek Nation over civil and criminal causes was, therefore, abolished in accordance with the 1898 Appropriations Act and the Curtis Act. Congress could have reestablished the Nation's civil and criminal jurisdiction when an allotment agreement was later reached, but, choosing retribution over amnesty, specifically declined to do so in section 47 of the 1901 act ratifying the Creek allotment agreement. The Board, therefore, holds that the general civil and criminal judicial authority of the Creek Nation was abolished by act of Congress.

The next question is whether that Nation's general judicial authority was ever restored. Appellant first sug-

gests that its full judicial authority, including civil and criminal jurisdiction, was either restored or again recognized through the court's decision in *Harjo, supra*. The issue in *Harjo,* however, was only whether the Creek legislative and executive branches had been destroyed. Therefore, although the court discussed the general effect of the Curtis Act, it did not construe that Act or similar legislation as related to the abolition or modification of judicial authority. *Harjo* did not directly address the issue of Creek judicial authority and therefore cannot be relied upon as binding authority for appellant's proposition.

Appellant also contends that BIA's approval of its 1979 constitution, which included a court system, constitutes recognition of its general judicial authority. Appellee argues that appellant is limited to a court system capable of reviewing acts of its legislative and executive branches, but not capable of hearing general civil and criminal cases. Appellee alleges that its approval of appellant's constitution merely recognized the formation of a court system of limited jurisdiction.

The BIA does not have authority administratively to grant powers that Congress has removed. However misguided later generations may believe earlier congressional policy to be, that policy was embodied in specific acts of Congress,[2] and may be changed only through another act of Congress. The effect of earlier congressional enactments cannot be overcome simply through BIA approval of appellant's constitution.

The question, then, is whether Congress has restored appellant's full judicial authority. Appellant argues that

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[2] This Board is not the proper forum in which to question the constitutionality of an act of Congress. *Zarr* v. *Acting Deputy Director, Office of Indian Education Programs,* 11 IBIA 174, 90 I.D. 172 (1983); *Estate of Stowhy,* 1 IBIA 269, 79 I.D. 428 (1972).

the Curtis Act was repealed by section 9 of the OIWA, 25 U.S.C. § 509 (1982), which states: "The Secretary of the Interior is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this subchapter. All Acts or parts of Acts inconsistent with this subchapter are hereby repealed." Appellant argues that the Curtis Act, by abolishing Creek tribal courts, is inconsistent with the OIWA, which allows the reorganization of Indian tribal governments, including court systems. Because tribal government must inherently include judicial authority, appellant contends the inconsistent Curtis Act was repealed by the OIWA.

The Board has carefully considered the arguments and authorities for and against repeal of the Curtis Act by the OIWA, and has concluded that although the two Acts are opposite in theory and practice, they are not legally inconsistent. The OIWA allows Oklahoma tribes to reorganize whatever existing governmental powers they legally possess; it is not a grant of new powers. The Curtis Act limits appellant's governmental powers by depriving it of civil and criminal judicial authority. A government lacking power to adjudicate civil and criminal disputes among its citizens is obviously weakened, but its existence is not thereby rendered impossible. *Cf., Harjo.* Because the Curtis Act is not legally inconsistent with the OIWA, it was not repealed by section 9 of that Act.[3]

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[3] Because of these holdings, it is unnecessary to reach the remaining issues raised by the parties.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Anne Poindexter Lewis
ANNE POINDEXTER LEWIS
Administrative Judge

I concur:

/s/ Bernard V. Parrette
BERNARD V. PARRETTE
Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT SPECIALLY CONCURRING:

Although I am forced to agree with the majority on the legal issue raised in this case, I do so with serious reservations. The court in *Harjo* recited the contemptible history of Federal dealings with the Creek Nation, noting that the official "attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate, and generally prevent from functioning" the tribe's legislative and executive branches. *Harjo,* 420 F. Supp. at 1130. The case before us demonstrates the continuation of this bureaucratic imperialism against the tribe's judicial branch. This, in my judgment, constitutes a serious violation of the United States' trust responsibility to the Muscogee (Creek) Nation.

In *Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation* v. *Commissioner of Indian Affairs,* 9 IBIA 203, 89 I.D. 132 (1982); *disapproved, in part, on other grounds, Robert Burnette* v. *Deputy Assistant Secretary—Indian Affairs (Operations),* 10 IBIA 464, 89 I.D. 609 (1982), this Board conducted an extensive review of the history, purpose, wording, and structure of the Indian Reorganization Act of 1934 (IRA), and concluded that Congress intended to impose a specific trust responsibility on the Secretary of the Interior and the Bureau of Indian Affairs with respect to tribes organized under the Act. More specifically, the Board found that the government-to-government relationships between the United States and Indian tribes organized under the IRA are governed by the trust responsibility established by the IRA and therefore are "subject to the limitations inhering in * * * a guardianship and to pertinent constitutional restrictions." I believe a similar trust responsibility applies to tribes organized under the Oklahoma Indian Welfare Act.

Consequently, in its relations with the Creek Nation, the actions of the United States as trustee and BIA as its agent must be judged in accordance with general principles of trust law. In an analogous situation, a private trustee has a duty to disclose or provide information to the beneficiary which the trustee knows, or should have known, affects the beneficiary's interests. *See* Restatement (Second) of Trusts § 173, comment d (1959).

Under the circumstances of the present case, BIA knew or should have known that the policy formulated in the late 1800's toward the Five Tribes and, in particular, the Creek Nation, was intended to subvert tribal government. Whatever the rationale for this strategy at the turn of the century, subsequently Federal policy has been to encourage and foster Indian self-determination and self-government. In the case before us however, the actions of BIA have only served to frustrate that policy. The BIA has known since 1976 that the Creek Nation was attempting to reorganize its government, and since 1979 that it intended to include its judicial branch in the reorganization. Under the Oklahoma Indian Welfare Act, the BIA has an affirmative duty to aid in this reorganizational effort. Its failure to do so results in a violation of the trust responsibility.

As trustee, the United States is duty bound to enhance and protect the governmental interests of the Creek Nation. In the present case, the trustee should seek an immediate end to the "bureaucratic imperialism" which has stifled the self-determination and self-government of the Nation. Instead of permitting a situation to arise where the BIA finds itself arguing before this Board that the Creek Nation cannot possess full judicial authority over its own people because of an anachronistic law, the trustee was on notice and should have sought a legislative solution to this injustice.

I am fully aware of the probability that the Federal Government now, as in the 1800's, is receiving and responding to political pressure from non-Indians in Oklahoma. As the courts and this Board have stated many times, however, the Federal Government owes no trust responsibility to non-Indians. *See, e.g., Bailess* v. *Paukune,* 344 U.S. 171 (1952); *Chemah* v. *Fodder,* 259 F. Supp. 910 (W. D. Okla. 1966); *Estate of Douglas Leonard Ducheneaux,* 13 IBIA 169, 92 I.D. 247 (1985). It, therefore, appears that the Government's responsibility is to deal with non-Indian political pressure without sacrificing the rights of the trust beneficiary.

In my opinion, the United States, through its agents, has and continues to inexcusably violate its trust responsibility to the Muscogee (Creek) Nation. With great reluctance then, of necessity, I concur with the result reached by the Board.

/s/ Jerry Muskrat
JERRY MUSKRAT
Administrative Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5377

MUSCOGEE (CREEK) NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, APPELLANT

v.

DONALD HODEL, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR

[Filed July 15, 1988]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: ROBINSON, RUTH B. GINSBURG and SENTELLE,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause

is hereby reversed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre, Clerk
CONSTANCE L. DUPRE, CLERK

Date: July 15, 1988
Opinion for the Court filed by Circuit Judge Sentelle.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. The Indian Department Appropriations Act of 1897, ch. 3, 30 Stat. 62, provides in relevant part (30 Stat. 83):

> * * * [O]n and after January first, eighteen hundred and ninety-eight, the United States courts in [the Indian] Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, * * * ; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of [the Five Civilized] tribes otherwise who can speak and understand the English language may serve as a juror in any of said courts.

2. Section 28 of the Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 504-505, provides:

> That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said territory by filing with the clerk of

of the court the original papers in the suit: *Provided,* That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

3. Sections 3 and 9 of the Oklahoma Indian Welfare Act of 1936, ch. 831, 49 Stat. 1967-1968, 25 U.S.C. 503 and 509, provide in relevant part:

> SEC. 3. Any recognized tribe or band of Indians residing in Oklahoma shall have the right to organize for its common welfare and to adopt a constitution and bylaws, under such rules and regulations as the Secretary shall prescribe. * * * .
>
> SEC. 9. * * * All Acts or parts of Acts inconsistent herewith are hereby repealed.

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(2)

No. 88-798

In The

Supreme Court of the United States

October Term, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR

Petitioner,

v.

THE MUSCOGEE (CREEK) NATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Muscogee (Creek) Nation may operate tribal courts established under a constitution adopted by the Nation and approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 501 et seq.?

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No. 88-798

In The

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October Term, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR

Petitioner,

v.

THE MUSCOGEE (CREEK) NATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

On August 17, 1979, the Secretary of the Interior approved a new Constitution for the Muscogee (Creek) Nation (Nation) providing for executive, legislative and judicial branches.[1] The Nation, pursuant to its Constitution, subsequently adopted a judicial code providing that its courts would exercise general civil and criminal jurisdiction limited to enrolled members of the Tribe. When

[1] The Secretary had been ordered to supervise the adoption of a new Constitution. *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

the Nation sought federal funding for this tribal court system, the Secretary denied the request on the ground that the Nation was precluded from having a court system because of the effect of the Curtis Act of June 28, 1898, 30 Stat. 495. As part of a policy of forcing the Five Tribes[2] of Oklahoma to agree to allotment, the Curtis Act had abolished tribal court systems unless the tribe entered into and ratified allotment agreements that specifically preserved those tribal courts. It was the Secretary's position that this Act still bars the Creek Nation from establishing and operating tribal courts.

The Nation appealed this decision administratively and when that proved unsuccessful, brought suit against the Secretary in federal court. The Court of Appeals for the District of Columbia Circuit set aside the Secretary's decision. The Court of Appeals held that the Curtis Act's prohibition of tribal courts, while not specifically repealed by subsequent allotment legislation, has been repealed by the 1936 Oklahoma Indian Welfare Act, 25 U.S.C. § 501 et seq. [hereinafter OIWA], and that the Nation, like other Tribes nationwide, is entitled to have a tribal court. The Secretary has petitioned this Court for review.

Rather than respond to the Interior's statement, the Muscogee (Creek) Nation refers this Court to the statement of facts contained in the Court of Appeals decision. *See* Petition at 1a-6a.

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[2] These tribes, so-called the "Five Civilized Tribes," consist of the Seminoles, Creeks, Choctaws, Chickasaws, and Cherokees, and are all located in eastern Oklahoma. During the late nineteenth century Congress enacted numerous statutes affecting the Five Tribes as a group, resulting in common, but not identical, legal histories for the Five Tribes.

REASONS FOR DENYING THE WRIT

Although the Secretary of the Interior argues the Court of Appeals erred in recognizing the authority of the Muscogee (Creek) Nation to maintain tribal courts, Petition at 17-24, he does not seek immediate plenary review of the Court's judgment by this Court. Instead, he asks the Court to hold this case pending decisions and possible petitions for writs of certiorari in supposedly related cases in which neither the United States nor the Muscogee Nation is a party. Petition at 28.

This Court should deny that request and promptly deny review in this case for several reasons. First, the Muscogee Nation has been gravely harmed by the Secretary's long-continued obstruction of the functioning of its tribal government. Second, this case presents no question of general importance in federal Indian law. Third, this case does not involve the issue of primary concern to the United States: the jurisdictional status of restricted Indian allotments of the Five Tribes. Finally, there is no conflict between the decision below and controlling state and federal precedent.

1. Postponing Action On The Petition Would Prolong Without Justification The Government's Longstanding Obstruction Of The Nation's Tribal Government.

The judgment below sets aside the Secretary of the Interior's refusal to recognize the authority of the Nation to maintain tribal courts. The Nation established its tribal court system pursuant to a constitution adopted by it in 1979 and approved by the Secretary. The constitution vests the Nation's judicial power "in one Supreme Court

limited to matters of The Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain." Muscogee (Creek) Nation Constitution, Art. VII, Sec. 1. The Nation has maintained tribal courts since 1982.

The Nation established its present constitutional government only after protracted litigation against the Secretary. This litigation followed decades of recurrent and deliberate frustration of the Nation's governmental structure by the Secretary. *See generally Harjo v. Kleppe*, 420 F.Supp 1110 (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). District Judge Bryant, after meticulous review of this history in *Harjo*, stated that the Secretary's "attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate and generally prevent from functioning the tribal governments [of the Five Civilized Tribes, including the Nation] expressly preserved" by Congress. 420 F.Supp at 1130. Judge Bryant observed that for decades, *continuing into the 1970s*, "the Department successfully pre-empted the constitutional processes of the tribe for its own purpose," and the "influence of the Bureau over the various incarnations of the Creek national government between 1920 and 1970 was exercised wholly without the benefit of any congressional mandate." *Id.* at 1132, 1139.

Judge Bryant summarized the Nation's claim in *Harjo* as "at bottom, simply an assertion of their right to democratic self-government" and concluded that the "plaintiffs have demonstrated a clear legal entitlement to have these

rights vindicated, and the Court cannot honorably fail to do otherwise." *Id.* at 1143.[3]

The Secretary of Interior, in essence, asks this Court to hold this case so as to "preserve the opportunity for a comprehensive and coherent resolution of the various jurisdictional issues raised by "parallel state and federal cases." Petition at 27-28. The delay proposed by the Secretary is without justification. It would merely continue the grave and longstanding harm to the Nation posed by the Secretary's obstruction of the Nation's tribal government processes. This Court should deny the petition forthwith.

2. This Case Presents No Question of General Importance in Federal Indian Law.

The Court of Appeals decision is of limited applicability, as it simply holds that the OIWA authorized the Muscogee Nation to adopt a constitution providing for exercise of judicial powers. Although it is of great importance to the Muscogee Nation, it potentially affects the judicial authority of only one other tribe in Oklahoma,

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[3] *See also* Administrative Law Judge Muskrat's reluctant special concurrence in the decision of the Interior Board of Indian Appeals in the present case:

> "The court in *Harjo* recited the contemptible history of Federal dealings with the Creek Nation . . . The case before us demonstrates the continuation of this bureaucratic imperialism against the tribe's judicial branch. This, in my judgment, constitutes a serious violation of the United States' trust responsibility to the Muscogee (Creek) Nation." Petition at 52a.

the Cherokee Nation.[4] The judicial authority of the other three of the Five Tribes has been recognized only recently,[5] and most of the numerous other tribes in Oklahoma maintain court systems.[6] Thus, the court of

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[4] The Cherokees had refused to negotiate any allotment agreement prior to enactment of the Curtis Act, and the allotment act which was finally enacted into law, like the Creek Allotment Act, expressly provided that the Cherokee courts were not revived. *See* 5 Annual Report of the Commission to the Five Civilized Tribes (1898); *See also* Cherokee Allotment Act of March 1, 1901, 21 Stat. 848, § 72.

[5] The Court of Appeals recognized that the Choctaws and Chickasaws avoided the Curtis Act abolition of tribal courts by ratifying allotment agreements superceding the Curtis Act tribal court provision before it took effect. Petition at 4a. This was consistent with the District Court's similar findings concerning preservation of the Seminole tribal courts. Petition at 29a. Up until the District Court decision, the Secretary had insisted that the Curtis Act abolished the courts of each of the Five Tribes. After that decision, the Secretary dealt with the issue of the Creek Nation's judicial authority separately. See Associate Solicitor's Memorandum of January 12, 1984 (C.A. App. 4-64). The authority of the Seminoles, Choctaws, and Chickasaws to maintain courts is now conceded by the Secretary. Petition at 6 and n.5. Yet ironically, the Secretary cites their alleged lack of tribal courts as further reason to believe that revitalization of the Muscogee Nation courts is unnecessary. Petition at 22, n.14. In fact, the Secretary's incorrect interpretation and implementation of the Curtis Act has as a practical matter prevented the Choctaws, Chickasaw, and Seminoles from maintaining tribal courts, not lack of necessity or interest on the part of those tribes.

[6] The Secretary has funded courts for all Oklahoma tribes, other than the Five Tribes. 25 C.F.R. § 11.1 (1987) At present, these Oklahoma tribes exercise tribal court jurisdiction in the form of Courts of Indian Offenses ("CFR Courts") or separate tribal courts. These courts exercise "checkerboard" jurisdiction over civil and criminal matters.

Appeals' recognition of the judicial authority of the Muscogee (Creek) Nation simply places the Nation on an equal footing with other Oklahoma tribes, and with virtually every other tribe in the country.

While arguing that the Court of Appeals erred in interpreting the OIWA to allow the Muscogee (Creek) Nation to exercise judicial powers,[7] the Secretary concedes in this Court the authority of the Nation to maintain a tribal court. Petition at p. 11, n.11. The Secretary presents no legal authority for this "limited" tribal court. The Nation's authority to exercise judicial powers through its tribal court is the sole issue in the present case.

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[7] The Secretary's arguments on the merits require little response, because the Court of Appeals decision has already extensively and correctly addressed those arguments in its opinion. *See* Petition at 7a - 15a. The Indians Reorganization Act of 1934, 25 U.S.C. § 476, allows tribes outside Oklahoma to adopt constitutions to exercise "all powers vested in any tribe or tribal council by existing law." Petition at 5a. When Congress separately addressed the reorganization of Oklahoma tribes two years later in the OIWA, it did not include that limitation in the provision concerning tribal constitutions. The Court of Appeals decision recognized that if Congress had intended such a limitation to apply to Oklahoma tribes, it could have either simply amended the IRA to include Oklahoma tribes, or added a similar provision in the OIWA. The Court of Appeals applied standard rules of statutory construction of federal Indian law in arriving at its conclusion that Congress did not intend to limit tribes organizing under the OIWA to the exercise of "powers vested . . . . by existing law." The Court of Appeals decision allows a sensible equalizing principle to be implemented.

3. There Is No "Common Jurisdictional Issue" Raised By The Supposedly "Parallel" State Cases.

a. The Judgment In the Present Case Is Not Predicated On The Jurisdictional Status of Restricted Allotments.

In essence, the Secretary's quarrel is not with the D.C. Circuit's holding, but with the lower court's "perception" that the State of Oklahoma lacks criminal jurisdiction over restricted allotments of the Muscogee (Creek) Nation. The Secretary believes this "perception" is wrong, and that the State has criminal jurisdiction over restricted allotments of the Five Civilized Tribes.[8]

With all respect to the Secretary, this Court sits to review judgments, not "perceptions" that are "not 'critical' to" a lower court's decision. Petition at 25. As this Court recently held in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), "since this Court reviews judgments, not opinions, we must determine whether the Court of Appeal's legal error resulted in an erroneous judgment . . . " (footnote omitted). The judgment below is

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[8] The Secretary states "it is the longstanding position of the United States and the State of Oklahoma that the State does have jurisdiction over ordinary crimes commited by Indians on both restricted allotments and tribal lands within the original territory of the Five Civilized Tribes and eastern Oklahoma". Petition at 24. However, the Secretary obscures the fact that the federal government currently exercises federal jurisdiction over major crimes in eastern Oklahoma. The federal court recently convicted a Muscogee citizen for the murder of another Muscogee citizen on a Muscogee allotment. *United States v. Sands*, Docket No. 88-21-Cr (E.D.Ok. Sept. 13, 1988), *appeal docketed* No. 88-2514 (10th Cir. Sept. 30, 1988) (appeal on issues other than jurisdiction). *See* Appendix A at 1a-6a.

plainly not predicated on the jurisdictional status of restricted Creek allotments. The Secretary so admits. Petition at 26. ("We do not, however, suggest that the Court grant plenary review in the instant case at the present time based on the Court of Appeals' assumption regarding the scope of state jurisdiction, *since that question is not directly involved in this case").* (Emphasis added).

b. The *Brooks* And *Klindt* Cases, On Rehearing Before the Oklahoma Court of Criminal Appeals, Are Unlikely To Present Any Question As To The Jurisdictional Status Of Restricted Allotments.

The state cases which the Secretary suggests are "parallel" to this case also do not present the jurisdictional question that concerns the Secretary: Whether state or federal courts have jurisdiction to try crimes occurring on restricted allotments of the Five Tribes. The two cases relied on by the Secretary are *State v. Brooks,* No. 2-80117 (Okla. Cr. App. Oct. 14, 1988) (*See* Appendix B, at 7a) and *State v. Klindt,* No. S-84-781 (Okla. Cr. App. Nov. 7, 1986), opinion withdrawn and rehearing granted (July 26, 1988). (*See* Appendix C, at 16a).

Brooks concerns criminal enforcement of state cigarette taxes on sales by an Indian smokeshop to nonmembers. The original *Brooks* Court of Criminal Appeals opinion expressly held that the restricted allotments of the Five Tribes are Indian Country, and that the State has no jurisdiction to prosecute a crime by an Indian in Indian Country. That opinion was withdrawn and replaced by the new decision, which makes no express holding as to the Indian Country status of a restricted Creek allotment. Instead, the Oklahoma Court of Criminal Appeals upheld the lower court's dismissal of the

prosecution of the Indian defendants, because of an insufficiency in the criminal information which did not charge violations of state tax laws for sales to non-Indians as opposed to sales to Indians. Of relevance in the present case, the Secretary does not suggest any inconsistency between the *Brooks* decision and this Court's holdings in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).[9]

Klindt is still pending before the Oklahoma Court of Criminal Appeals on the motion for rehearing. *Klindt* involves an assault with dangerous weapon on a Cherokee restricted allotment by a person who has not offered any proof that he is an Indian. This case has no likely relevance to the present case, nor to the jurisdictional issues of concern to the Secretary. As the Secretary recognizes, Petition at 9, n.7, it is well settled that state courts have jurisdiction over crimes committed by non-Indians where the victim is not an Indian, even in Indian Country. e.g., *United States v. Draper*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1882); *Goforth v. State*, 644 P.2d 114 (Okla. Cr. 1982).

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[9] The Secretary incorrectly suggests that "the recent decision in *Brooks* instead discusses the scope of the State's taxing and related regulatory authority over matters *affecting Indians* on a restricted allotment". Petition at 25 (emphasis added). Nothing in the recent *Brooks* opinion in any way suggests any state jurisdiction over Indian smokeshops beyond what has been sanctioned by this Court in *Chemehuevi*, *Colville*, and *Moe*.

The Secretary speculates that "if the State does file a petition in *Brooks,* it is *possible* that a decision by this Court in the State's favor would . . . (conclude) that the State has ordinary civil and criminal jurisdiction over matters affecting Indians on Indians lands" Petition at 25. (emphasis added). This is pure conjecture, and an unlikely conjecture at that. There is simply no reason to delay implementation of the D.C. Circuit's judgment on the speculation that the State *may* seek review of *Brooks* or *Klindt,* which, in any event, do not present the issue of concern to the Secretary, or any issue worthy of review by this Court.

4. There is No Conflict Between The Decision Below And Controlling State and Federal Court Decisions.

The Secretary presupposes a federal-state conflict between the "perception" of the Court of Appeals in this case and *Ex parte Nowabbi,* 60 Okl. Cr. 111, 61 P.2d 1139 (1936). Petition at 24 - 26. There is, however, no reason to believe that *Nowabbi* is good law today. *Nowabbi* was criticized and withdrawn by the Oklahoma Supreme Court in *State ex rel May v. Seneca-Cayuga Tribe,* 711 P.2d 77, 81, n.17 (1985). The reasoning of *Nowabbi* is obviously flawed as recognized by the court in *May v. Seneca-Cayuga,* 711 P.2d at 81. *See also Felix S. Cohen's Handbook of Federal Indian Law,* (1982 ed.), pp. 777-780 and especially n.84.

Consideration of the Secretary's jurisdictional issue should await a case squarely presenting that issue, if indeed plenary consideration of that question by this

Court ever proves necessary. There is no reason to postulate likelihood that federal and state courts will differ if this question is litigated. In the past decade, federal and state courts have agreed on the "Indian Country" status of: (1) restricted Osage allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Cr. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (following *United States v. Ramsey*, 271 U.S. 467 (1926)), (2) Kiowa trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978) (agreeing with unpublished federal district court decision to the same effect, *see* 573 P.2d at 264), and (3) tribal trust lands, compare *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) *cert. den. sub. nom., Oklahoma Tax Commission v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation).

CONCLUSION

The Muscogee (Creek) Nation has suffered many impediments at the hands of the Secretary of the Interior. Grant of certiorari and the holding of this case in abeyance until the State of Oklahoma, an adversarial nonparty to this action, makes decisions on two unrelated cases would irreparably harm the Muscogee (Creek) Nation. This case should not be held in abeyance. Appellant's petition for writ of certiorari should be denied.

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APPENDIX A

United States District Court
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	(Filed September 13, 1988)
RICKY LEE SANDS	Case Number: 88-21-CR

(Name and Address of Defendant)
Steven Greubel, Asst. P.D.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:
[[x] guilty [ ] nolo contendere] as to count(s) Two, and
[ ] not guilty as to count(s) _____ .

THERE WAS A:
[[ ] finding [xx] verdict] of guilty as to count(s) One.

THERE WAS A:
[[ ] finding [ ] verdict] of not guilty as to count(s) ___.
[ ] judgment of acquittal as to count(s) _____ .
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: On or about the 12th day of December, 1987, in the Eastern District of Oklahoma, the defendant did commit murder, and possess a firearm moved interstate, after former felony conviction, all in violation of Title 18, United States Code, Section 1153, 1111, 922(g)(1) and 924(a)(1)(B).

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count 1, the defendant is committed to the custody of the Attorney General of the United States or his authorized

representative for imprisonment for a term of life. It is adjudged that as to Count 2, the defendant is committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of Five (5) years. The sentence imposed in Count 2 is to run consecutively to the sentence imposed in Count 1. Restitution has been considered in this case, but due to the defendant's current and potential financial status, no restitution will be ordered.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1 and 2 as follows:

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

September 13, 1988
Date of Imposition of Sentence

/s/ Frank H. Seay
Signature of Judicial Officer

Frank H. Seay, U.S. District Judge
Name and Title of Judicial Officer

September 13, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	No. 88-21-CR
vs.	)	
RICKY LEE SANDS, Defendant.	)	

INDICTMENT
(Filed April 19, 1988)

The Grand Jury charges:

COUNT I

(18 USC §1153 and 18 USC §1111)

On or about the 12th day of December, 1987, at Okfuskee County, Oklahoma, in Indian Country, in the Eastern District of Oklahoma, RICKY LEE SANDS, an Indian, did wilfully and without justifiable cause, wrongfully, unlawfully, with premeditation and malice aforethought, kill a human being, that is, John Mauldin, by shooting John Mauldin with a .22 caliber pistol, thereby causing mortal wounds from which John Mauldin did languish and die, in violation of Title 18, United States Code, Section 1153 and Title 18, United States Code, Section 1111.

COUNT II

(18 USC §922(g)(1) and §924(a)(1)(B))

On or about the 12th day of December, 1987, in the Eastern District of Oklahoma, RICKY LEE SANDS, defendant herein, knowingly and intentionally did possess in commerce, firearms, to-wit: a .22 caliber pistol, and a single shot .410 shotgun, serial number AL212488, which

had previously been shipped or transported in interstate commerce, said defendant having prior thereto been convicted in the District Court of Okfuskee County, State of Oklahoma, of felonies punishable by imprisonment for terms exceeding one year; all in violation of Title 18, United States Code, Section 922(g)(1) and Title 18, United States Code Section 924(a)(1)(B).

A TRUE BILL

/s/ Robert W. Bush
GRAND JURY FOREMAN

/s/ Roger Hilfiger
ROGER HILFIGER
United States Attorney

/s/ Sheldon J. Sperling
SHELDON J. SPERLING
Assistant United States Attorney

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA Appellant, -vs- CHESTER LEE BROOKS, A/K/A ACHISSON AMENSHI, and LARRY JOE BROOKS, Appellees.	)	No. S-85-117

OPINION ON REHEARING

(Filed Oct. 14, 1988)

BRETT, Presiding Judge:

Appellants, Chester Lee Brooks, a/k/a Achisson Amenshi, and Larry Joe Brooks, were charged in Tulsa County District Court, Case No. CRM-84-1026, with violating sections of the Cigarette Tax Act. Specifically, they were charged with willfully failing to produce required cigarette sales records, hindering or preventing the inspection of such records, and hindering or preventing the examination of their store in which cigarettes were kept. These acts constitute misdemeanor violations of Title 68 O.S. 1981, § 315, and are punishable by twelve months' imprisonment in the county jail, or a fine not to exceed five hundred dollars ($500.00), or both. *See* 68 O.S. 1981, § 317(b).

The State filed informations against appellees in district court. Appellees then filed a motion to dismiss the charges, claiming that the land on which the alleged offenses occurred is "Indian Country" (*see* 18 U.S.C. 1151(c)) over which there is no state jurisdiction. (O.R.

23-25) In accordance with the appellees' arguments, the trial judge ordered the cause dismissed. The trial judge's order was affirmed by Special District Judge Gordon McCallister. 22 O.S. 1981, Ch. 18, App. Rule 6.2, Rules of the Court of Criminal Appeals. (O.R. 87-88) This case was then brought before this Court on the narrow question of whether the lower court properly dismissed for lack of jurisdiction the charges against appellees, (*see* 22 O.S. 1981, Ch. 18, App. Rule 6.1, Rules of the Court of Criminal Appeals), and we affirmed the lower court's ruling. That opinion, rendered on November 7, 1986, was vacated by order on July 26, 1988, and this opinion on rehearing is delivered.

Appellees are members of the Delaware Tribe of Indians who leased some property from members of the Creek Indian Nation and operated a cigarette store or "smoke shop" thereon. On May 11, 1984, agents of the Oklahoma State Tax Commission went to appellees' smoke shop to seize unstamped cigarettes and tobacco products. One of the agents, Rick Cleary, went into the shop and purchased a carton of cigarettes on which no statutorily required Oklahoma Tax stamps were affixed. *See* 68 O.S.Supp. 1984, § 302. Appellees did not inquire into his status as an Indian or non-Indian prior to making the sale. Later, the other agent, Gertie Rogers, identified herself as an agent of the Oklahoma Tax Commission and requested to enter the store pursuant to her authority under 68 O.S. 1981, § 315. The attendant on duty locked the front door and refused to admit her. He told her not to return without a Federal Marshall because the land was Indian land over which the State had no jurisdiction. (O.R. 4,5)

On May 16, Ms. Rogers signed an affidavit supporting a warrant to search appellee's establishment for unstamped cigarettes and tobacco products, and records of purchases and sales of these items. The next day, Deputy R.D. McAtee accompanied these agents to the smoke shop and attempted to execute the warrant. Appellees refused to comply and were subsequently arrested.

The sole issue before this Court is whether the district court had jurisdiction to enforce certain recordkeeping and inspection provisions of Oklahoma's Cigarette Tax Act against Indians (appellees) who sold cigarettes from an establishment located on Indian lands. Appellees' argument, both at the lower court level and on appeal, is that because they are Indians, and the land in question is Indian Country, they are absolutely shielded from state court jurisdiction under the doctrine of "sovereign immunity." This argument, however, fails to consider the fact that in this unique area of state taxation of Indian cigarette sales, the United States Supreme Court has authorized both state imposition of taxes on sales to non- and off-reservation Indians, and state imposition of certain recordkeeping requirements designed to keep track of those sales – regardless of whether sovereign immunity would, under different circumstances, provide an absolute defense to such regulation. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1980). According to *Colville*, neither appellants' status as Indians, nor the status of their land as Indian Country pursuant to 18 U.S.C. §1151(c), would provide them with a sovereign immunity "shield" from state regulation.

Therefore, because the existence or non-existence of appellants' sovereign immunity is irrelevant to the determination of the particular issue at hand, we do not now address it. Instead, our focus will be on what we feel is the dispositive issue: whether the United States Supreme Court cases, which sanction the imposition of state tax and recordkeeping requirements on Indians on Indian Country who sell cigarettes to non- or off-reservation Indians, provide grounds for the state court prosecution of the charges in this case.

The United States Supreme Court has clearly espoused its view of states' attempts to impose their taxes on Indians:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Commission*, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 1114 (1973). Thus, "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule [against such a practice]." *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, ___, 107 S.Ct. 1083, 1091 n. 17, 94 L.Ed.2d 244 (1987) (emphasis in original).

These cases were never intended, however, to establish "an inflexible *per se* rule precluding state *jurisdiction* over tribes and tribal members in the absence of express

congressional consent." *Id.* at ___, 107 S.Ct. at 1091 (emphasis added). In fact, "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation . . . and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983). Examples of those situations in which a state would be authorized to assert jurisdiction over otherwise immune tribal activities are found in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). See *Cabazon*, ___ U.S. at ___, 107 S.Ct. at 1091.

In both *Moe* and *Colville* the Supreme Court held that a State can, even in the absence of congressional consent, "require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers." See *Cabazon*, ___ U.S. at ___, 107 S.Ct. at 1092. When the issue is whether an Indian selling cigarettes from a store on Indian land is subject to state regulation of their sales to non-Indians, traditional obstacles to state jurisdiction and control are simply not pertinent: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at 155, 100 S.Ct. at 2082. *See also The Citizen Band Pottawatomie Indian Tribe of Oklahoma v. The Oklahoma Tax Commission*, No.

CIV-87-0338-W, Order of April 15 (W.D.Okla. 1988). Consequently, even if the lands at issue in the case at bar met the definition of Indian Country under 18 U.S.C. 1151(c), and appellants were, according to current law, found to be Indians, these facts would not automatically preclude state jurisdiction. According to the Court, "[w]hat the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.* "[I]f a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." *Id.*, 447 U.S. at 159, 100 S.Ct. at 2084.

The United States Supreme Court has thus granted to States the authority both to tax and to impose certain recordkeeping requirements on Indians in Indian Country, regarding their sales of cigarettes to non- or off-reservation Indians. *See Colville*, 447 U.S. at 161, 100 S.Ct. at 2085.[1] While we believe that implicit in this grant of authority is the concomitant power of enforcement through the state court system (*see also Citizen Band Potawatomie*) – which power the State was attempting to exercise in the instant case – such authority is not unconditional. Because the informations in this case did not relate specifically to appellees' cigarette sales to non-Indians or off-reservation Indians, and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land, we hold that the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy. Whether these

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[1] An example of a valid recordkeeping scheme can be found in *Colville*, 447 U.S. at 159, 100 S.Ct. at 2084.

charges, if addressed solely to appellees' sales to non-Indians and off-reservation Indians, would be considered valid under current United States Supreme Court precedent is not before this Court. Outside these narrow circumstances, state has no jurisdiction.

For the foregoing reasons, Case No. CRM-84-1026 is AFFIRMED.

A Rule VI appeal by the State, by and through the District Attorney of Tulsa County, from an order of the Honorable Gordon D. McCallister, Special Judge, dismissing for want of jurisdiction a violation of the Cigarette Tax Act in Tulsa County District Court, Case. No. CRM-84-1026. The Court of Criminal Appeals AFFIRMS.

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OPINION BY: BRETT, P.J.
BUSSEY, J.: DISSENTS
PARKS, J.: CONCURS

BUSSEY, J., DISSENTING:

I dissent. Even if the Creek allotment in this case were Indian Country, *c.f. Ex Parte Nowabbi*, 60 Okl.Cr. 111, 61 P.2d 1139 (1936),[1] I do not believe that the defendants in this case are entitled to any consideration for immunity from prosecution. They are Delaware Indians who leased a Creek Tribal allotment to operate a public business. The Supreme Court has determined that Indians

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[1] The Oklahoma Supreme Court has disapproved and withdrawn this case in part. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okla.1985). To the extent that Nowabbi may be construed to prevent lands in what was formerly Indian Territory which were allotted to tribes other than the Five Civilized Tribes from coming within the federal definition of Indian Country, I agree that the opinion was overly broad. However, this case involves land allotted to the Creek Tribe, which was among the Five Civilized Tribes.

who reside on a reservation but are not enrolled in the governing Tribe are not immune from taxation by the States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). If Indians in that situation are not immune from direct taxation by the State, I perceive no basis to consider immunity for these defendants who are not enrolled as members of the Creek Tribe. Furthermore, the State is not even trying to collect taxes from Indians. Rather, it is simply attempting to enforce its right to review records which it may require Indians to keep, even if those Indians are immune from taxation. *Ibid.*

The majority holds that, "Because the charges in this case did not relate specifically to appellees' cigarette sales to non-Indians or off-reservation Indians, *and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land,*" (emphasis added) the State lacked jurisdiction. Aside from the fact that the Supreme Court has not announced the "prerequisite" on which this holding turns, the defendants in this case could not have claimed immunity from prosecution in any event. The information filed in this case recited sufficient facts to state a crime under Oklahoma law, and I would reverse the decision of the District Court.

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA Appellant, -vs- CHESTER LEE BROOKS, A/K/A ACHISSON AMENSHI, and LARRY JOE BROOKS, Appellees.	)	No. S-85-117
THE STATE OF OKLAHOMA, Appellant, -vs- DICK EARL KLINDT, Appellee.	)	No. S-84-781

ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING OPINION

(Filed Jul. 26, 1988)

On November 7, 1986, this Court rendered an opinion consolidating two Rule VI appeals: *State v. Klindt*, S-84-781, and *State v. Brooks, A/K/A Achisson Amenshi, and Larry Joe Brooks*, S-85-117. Klindt was charged in Tulsa County District Court, Cases CRF-82-821 and CRM-82-538, with Assault With a Dangerous Weapon (21 O.S.1981, § 645) and Interference With an Officer (21 O.S. 1981, § 267). In a wholly unrelated case, Brooks and Amenshi were charged with Violation of Cigarette Tax Act (68 O.S.1981, §§ 315 and 317(b)) in Tulsa County District Court, Case No. CRM-84-1026. We consolidated these appeals because the district judges who rendered final determinations in each case based their dismissals

for lack of state court jurisdiction on the fact that the defendants in question were Indians and the alleged criminal acts occurred in "Indian Country" (see 18 U.S.C. § 1151).

On December 1, 1986, appellant filed a petition for rehearing. Having reviewed that petition, we find that our previous opinion should be withdrawn and these cases separated. These two cases will therefore be dealt with in separate opinions on rehearing.

IT IS THEREFORE ORDERED that the opinion of this Court in Case Nos. S-85-117 and S-84-781 be WITHDRAWN, and the clerk is so directed.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of July, 1988.

/s/ Tom Brett
TOM BRETT, PRESIDING JUDGE

/s/ Ed Parks
ED PARKS, JUDGE

ATTEST: James Patterson

_____
(Clerk)

FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-798

In the Supreme Court of the United States

OCTOBER TERM, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
PETITIONER

v.

THE MUSCOGEE (CREEK) NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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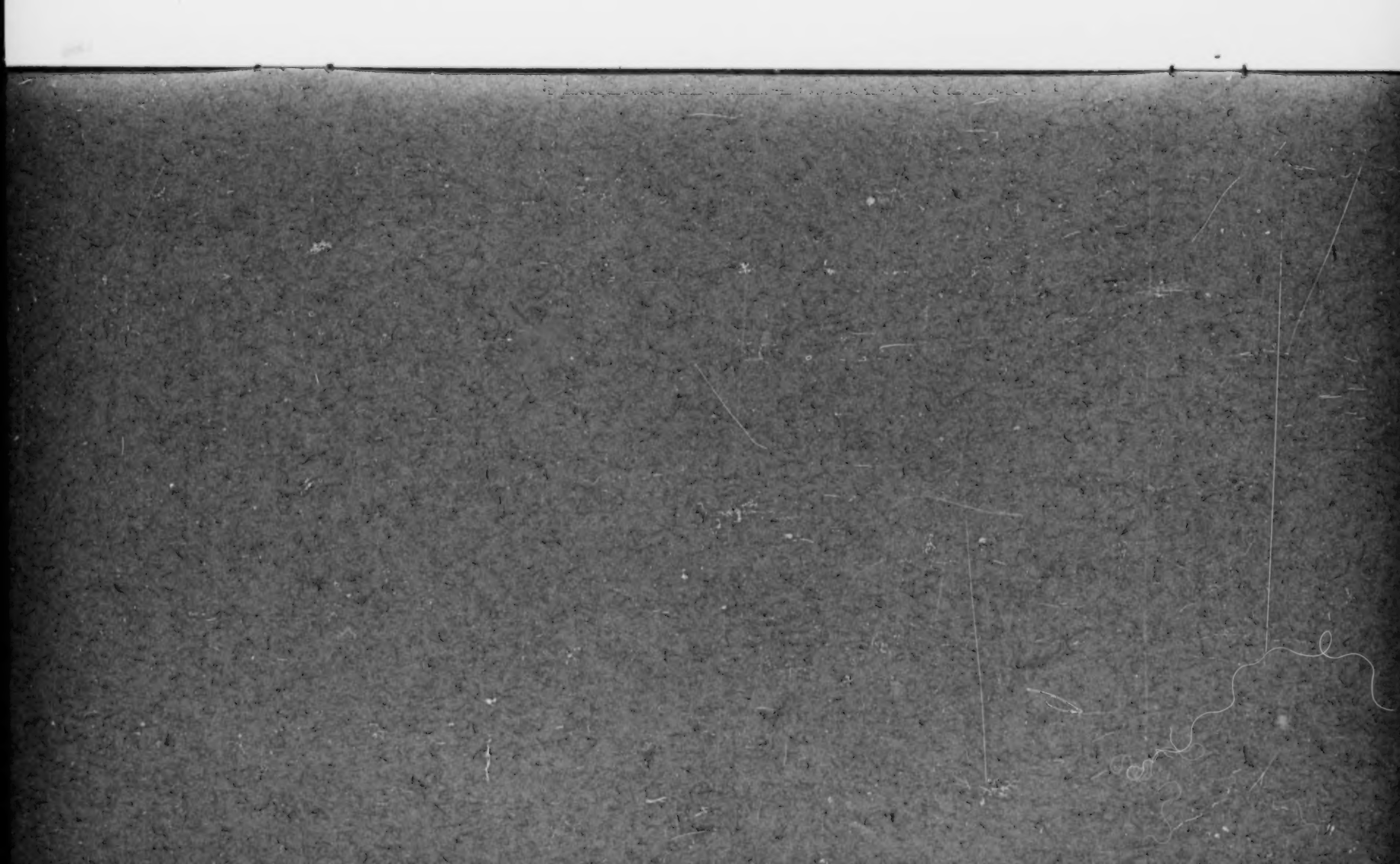

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Respondent makes no attempt to answer our argument (Pet. 5-7, 18-24) that the authority of the Muscogee (Creek) Nation to maintain tribal courts having general jurisdiction over tribal members was terminated by Section 28 of the Curtis Act of June 28, 1898 (ch. 517, § 28, 30 Stat. 504-505) and the Creek Allotment Act of March 1, 1901 (ch. 676, § 47, 31 Stat. 873) and was not revived by Section 3 of the Oklahoma Indian Welfare Act of 1936 (OIWA), 25 U.S.C. 503. Respondent mentions the merits only in a footnote (Br. in Opp. 7 n.7), in which it merely adopts the reasoning of the court of appeals that we have shown to be erroneous.

Although the court below clearly erred in directing the Secretary to recognize tribal courts that Congress long ago abolished, we do not urge the Court to grant plenary review at this time. Instead, we suggest (Pet. 26-28) that the Court hold the petition in this case pending the filing and disposition of a petition for a writ seeking review of

the decision of the Oklahoma Court of Criminal Appeals in *State* v. *Brooks,* No. S-85-117 (Oct. 14, 1988), which concerns the jurisdiction of the State of Oklahoma over the activities of Indians on restricted Creek allotments. The issues in this case and *Brooks* share a common legal and historical background, and they are closely related as a practical matter, because the need for tribal jurisdiction would be greatly diminished if the State has general jurisdiction over tribal members on allotted lands. *Brooks* has other important implications for the United States as well, because if the State is found to be without general civil and criminal jurisdiction on restricted allotments, the United States would have to assume primary responsibility for law enforcement on 413,000 acres of individual restricted lands and 60,000 of tribal lands of the Five Civilized Tribes that are scattered throughout eastern Oklahoma. Respondent nevertheless argues that the petition in this case should be denied outright, without regard to the imminent filing of a petition in *Brooks.* However, each of the reasons it advances for that course is insubstantial.

1. Respondent argues (Br. in Opp. 11) that it is a matter of speculation whether the State will actually file a certiorari petition in *Brooks.* Respondent is mistaken. On December 5, 1988, Justice White extended the time, to and including January 12, 1989, within which to file a certiorari petition in *Brooks* (*State of Oklahoma* v. *Brooks,* No. A-443), and we have been informed by the Office of the District Attorney for Tulsa County that the State will file a petition by that date. The Court therefore will have the opportunity to pass on the questions of state jurisdiction presented by *Brooks* in the very near future.

2. Respondent contends (Br. in Opp. 3-5) that to postpone action on the petition in this case pending the disposition of *Brooks* would unjustifiably prolong the sort

of bureaucratic obstruction of respondent's tribal government that was found in *Harjo* v. *Kleppe,* 420 F. Supp. 1110 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978). As the court below recognized (Pet. App. 8a-9a), however, *Harjo* concerned the federal government's policies toward the legislative and executive branches of the Creek Nation's government, which were "expressly preserved" by Congress. 420 F. Supp. at 1130. This case, by contrast, concerns the Secretary of the Interior's wholly lawful decision to refuse to furnish federal funds to support the judicial branch of the Creek Nation's government, which was expressly *abolished* by the Curtis Act and the Creek Allotment Act. This case therefore involves no improper "obstruction" of lawful governmental functions of the Muscogee Nation. In fact, respondent states (Br. in Opp. 4) that it has maintained tribal courts since 1982 without federal funding and without Secretarial approval of the general jurisdiction of those courts.[1] The course we propose therefore will not prevent respondent from maintaining its tribal courts pending a definitive determination of their legality.

3. In respondent's view (Br. in Opp. 8-9), the question of state jurisdiction over members of the Five Civilized Tribes on restricted allotments, at issue in *Brooks,* has no bearing on the establishment of tribal courts having the same jurisdiction. Respondent is wrong for two reasons. First, the court below expressed concern that under the original decision of the Oklahoma Court of Criminal Appeals in *Brooks* (which has since been withdrawn), the

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[1] Respondent notes (Br. in Opp. 3-4) that the Secretary approved its constitution, but respondent fails to acknowledge that the Secretary's approval expressly did not authorize any action under the constitution that would be contrary to federal law, as the establishment of tribal courts having general civil and criminal jurisdiction over tribal members would be. See Pet. 10; Pet. App. 26a.

State of Oklahoma did not have jurisdiction over the actions of Indians on restricted Creek allotments, and that there would be a "jurisdictional 'no man's land' " if tribal courts likewise did not have such jurisdiction (Pet. App. 14a-15a). Although the court below stated that this consideration was not "critical" to its decision sustaining respondent's tribal courts (*id.* at 14a), the court obviously found that factor to be relevant in construing Section 3 of the OIWA, and, at the very least, it demonstrates the interrelatedness of the questions of state jurisdiction in *Brooks* and tribal jurisdiction in this case. Second, even if the provisions of the Curtis Act and Creek Allotment Act that abolished the Creek tribal courts were implicitly repealed by Section 3 of the OIWA, the recognition of state jurisdiction in *Brooks* would furnish a sufficient reason for the Secretary's decision to deny federal funding to maintain a tribal court system that duplicates state jurisdiction.

4. Respondent next argues (Br. in Opp. 9-10) that *Brooks* would not actually present an occasion for this Court to resolve questions of state jurisdiction over Creek allotments. Thus, respondent argues that *Brooks* involves only state taxing authority, not general civil and criminal jurisdiction, and that the Oklahoma Court of Criminal Appeals' holding that the State cannot tax the sale of cigarettes by Indians to Indian customers on a restricted allotment is consistent with *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985). Those cases, however, held only that a State may not tax the sale of cigarettes to Indians on an Indian reservation; they did not hold that a State is barred from taxing sales on a restricted allotment where, as in most of eastern Oklahoma, there no longer is any Indian reservation. If

this Court grants review in *Brooks* and holds that Congress has authorized the State to apply even its tax statutes to sales made to Indians on restricted allotments, it would follow a fortiori that the State may subject Indians on restricted allotments to the general civil and criminal jurisdiction of its courts.

5. Finally, respondent suggests (Br. in Opp. 8 n.8) that the jurisdictional issues do not warrant review because the United States is currently exercising jurisdiction over major crimes in eastern Oklahoma in any event. Respondent relies on *United States* v. *Sands,* No. 88-21-Cr. (E.D. Okla. Sept. 13, 1988), in which a Muscogee Indian was convicted of the murder of another Muscogee Indian on a restricted allotment. See Br. in Opp. App. 1a-2a. Respondent fails to point out, however, that the United States brought those charges only after the state court had dismissed charges against the defendant for lack of jurisdiction (*State* v. *Sands,* CRS 87-149 (Dist. Ct. Okfuskee County, Okla., Feb. 23, 1988)), in order to assure that the defendant would not go unpunished.[2] Thus, the *Sands* case vividly demonstrates the need for a definitive resolution of the various jurisdictional issues affecting Indian lands in eastern Oklahoma.

For the foregoing reasons and those stated in the petition for a writ of certiorari, it is respectfully submitted that the petition should be held and disposed of as appropriate in light of the disposition of the petition to be filed by January 12, 1989, in *Brooks,* and in light of any further developments by that time in *State* v. *Klindt,* No.

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[2] We have been informed by the Office of the United States Attorney that it brought the jurisdictional issue to the attention of the district court.

S-84-781 (Okla. Crim. App. Nov. 7, 1986), rehearing granted (July 26, 1988).[3]

CHARLES FRIED
Solicitor General

DECEMBER 1988

[3] As we have explained (Pet. 14-15, 26, 28), the question of state jurisdiction over restricted allotments also is involved in *Klindt*, which, as of the date of the filing of this reply brief, was still pending on rehearing before the Oklahoma Court of Criminal Appeals. Although respondent is correct (Br. in Opp. 10) that the original decision in *Klindt* was remanded for a determination whether the defendant is an Indian, the court withdrew that decision on July 26, 1988. Pet. 15. It therefore is possible that the court will first address the jurisdictional issues in *Klindt* by assuming, arguendo, that the defendant is an Indian, and then remand (if appropriate) for resolution of the latter issue.

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